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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-1245

JOHN A. GEDERS,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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JOHN A. GEDERS, by and through his undersigned attorney, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The panel opinion of the court of appeals (App. A, infra, is reported at 566 F.2d 1277, the en banc opinion of the court of appeals has not as yet been reported (App. B, infra).

JURISDICTION

The en banc judgment of the court of appeals was entered on December 11, 1978. The court of appeals denied Petitioner's Motion for Rehearing and Reconsideration on January 10, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred in admitting into evidence, over objection, statements made by the defendant to an Assistant United States Attorney and federal law enforcement officials that were a part of plea bargaining discussions.

2. Whether the trial court erred in denying defendant's Motion in Limine and permitting the government to cross-examine the defendant and present evidence on rebuttal regarding matters discussed between the defendant, the government prosecutor, and federal law enforcement officials after the defendant had been indicted, during the course of a meeting between the defendant, the government prosecutor and federal law enforcement officials, where the defendant was advised that no discussion had between them would in any way relate to the pending case or be used against him.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

a. Fifth Amendment, United States Constitution:

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

b. Sixth Amendment, United States Constitution

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

Federal Rules of Criminal Procedure, Rule 11(e)(6); Title 18, United States Code; Rule 410, Federal Rules of Evidence; Title 28, United States Code.

STATEMENT OF CASE

Petitioner, John A. Geders, after having his conviction for violation of Title 18 U.S.C., § 371; Title 21, U.S.C., §§ 952(a) and 960(b); and violation of Title 21, U.S.C., § 841(a)(1), as reflected by three (3) counts of a three (3) count Information, reversed by the United States Supreme Court, was then re-tried by a jury before the Honorable George C. Young, Chief Judge, United States District Court, Middle District of Florida, and he was once again found guilty of each count. Thereafter, the defendant was referred for a pre-sentence investigation, and on January 3, 1977 he was sentenced on Count I to a term of imprisonment for three (3) years, and a special parole term of three (3) years to follow said term of imprisonment in accordance with Title 21, U.S.C., § 841; and he was further sentenced to a term of three (3) years on Counts II and III, which sentences were to run concurrently with the sentence imposed on Count I. A timely Notice of Appeal was filed in behalf of petitioner to the United States Court of Appeals for the Fifth Circuit. The panel opinion reported at 566 F.2d 1277 reversed the defendant's conviction, but the court's en banc opinion reinstated and affirmed said conviction.

The following abbreviations will be used throughout this Petition:

"R" - Record on Appeal

"App." - Appendix to Brief

STATEMENT OF FACTS

The defendant was originally charged with four (4) counts of a five (5) count Indictment; he proceeded to trial and was convicted of three (3) of the four (4) counts, and his conviction was ultimately reversed by the United States Supreme Court. Geders v. U.S.A., 96 S.Ct. 1330 (1976). The defendant was re-tried on the three (3) remaining counts, which charged him with several offenses relating to violations of Title 21, U.S.C., § 952(a); Title 21, U.S.C., §§ 952(a) and 960(b), and a violation of Title 21, U.S.C., § 841(a)(1).

The case proceeded to trial before Honorable George C. Young, Chief Judge, Middle District of Florida, before a jury of twelve (12) persons, as a consequence of which trial the defendant was convicted of all counts charged and sentenced as heretofore set forth.

Prior to the time that the defendant testified in the trial, counsel made an oral motion in limine to limit the government's cross-examination of the defendant (R. 582-590, 593-600, 704, 705)(App. C 1-17), in that certain information was obtained from the defendnat, after indictment herein, as a result of an interview with an Assistant United States Attorney and federal investigators while he had counsel, and predicated upon an agreement and understanding between all parties present that there would be no inquiry made regarding the facts of this case and nothing said would be used against the defendant, since this

discussion was a part of plea bargaining negotiations. (R. 593-599, 726-728, 758, 764, 767-768)(App. D 1-14). The court determined that it would proceed to hear the direct examination of Mr. Geders, and prior to the time that he was cross-examined by the government, out of the presence of the jury, he would hear the testimony and legal argument that related to the motion in limine. The defendant testified that at the request of Lowell Miller, who was then a United States Customs Officer, after indictment and at a point in time while he was represented by counsel, he had a meeting at the United States Attorney's Office with Mr. Miller, certain other government investigators, and Oscar Blasingame, an Assistant United States Attorney. The defendant testified that Mr. Miller "told me he wanted to see me in his office in about a week without any attorney," and that pursuant to that discussion an arrangement was made for the meeting hereinabove described. Mr. Geders went to the meeting without counsel, although as previously indicated, he was represented by counsel at the time. The defendant was told before the meeting, and at the meeting by Mr. Blasingame, that nothing he said would be used against him. There is a dispute whether the defendant was otherwise advised of his rights. There was a discussion between the parties present about an unrelated criminal situation and, in addition thereto, there was a discussion about Pedro Alvarez and, specifically, the defendant was asked whether or not title to a Prosche automobile owned by Mr. Alvarez was placed in the defendant's name, which activities he acknowledged. There were other discussions about the defendant, Mr. Alvarez, and the defendant's employment at

the "Sound Room," and, lastly, he was asked whether he ever went to New York to convert large bills to small bills for Mr. Alvarez, all of which questions he fully responded to. At no time prior to the aforesaid sequence of events and meetings had the defendant ever discussed with any law enforcement officials his relationship with Mr. Alvarez, the fact that Mr. Alvarez had an automobile placed in his name, his employment at the "Sound Room," and his trips to New York for Mr. Alvarez to convert large bills to small bills. (R. 707-711)(App. E 1-5). On cross-examination by the Assistant United States Attorney trying the case, Mr. Geders more fully explained the circumstances under which he had his initial meeting with Mr. Miller that gave rise to the latter interview (R. 711-714)(App. F 1-4), and he further related that the initial discussion he had with Mr. Miller was a discussion where Mr. Miller was seeking information about other criminal situations which he felt the defendant could aid and assist him with, which the defendant was willing to do. (R. 717, 718)(App. G 1,2). The defendant further related that there was a discussion between himself and Mr. Miller that centered around the dropping of these charges against the defendant in exchange for him providing information about criminal activities of other persons and acting as a government informant. (R. 726-728)(App. H 1-3).

The Government called Mr. Blasingame, who had since left government employ and was a practicing attorney in Pinellas County, Florida. (R. 733, 734)(App. I 1,2). Mr. Blasingame testified that he was the Assistant United States Attorney who handled the presentation of the facts involving the defendant herein to a

Federal Grand Jury, which gave rise to the return of the indictment herein; and, thereafter, he became the attorney who prosecuted the several defendants who were charged. (R. 735)(App. J 1). Mr. Blasingame further testified that Mr. Miller said, ". . . that he had contact with Geders and that Geders said he would like to come in." (R. 737)(App. K 1). Thereafter, Mr. Geders met with Mr. Blasingame; Mr. Miller; Special Agent Gene Hill of the Internal Revenue Service, Intelligence Division; and Charles Hudson of the United States Treasury Department, Bureau of Alcohol, Tobacco Tax & Firearms. (R. 737, 738)(App. L 1,2). Mr. Blasingame related that he acted as "master of ceremonies" for the meeting, he stated that he gave Mr. Geders his "so-called Miranda rights," discussed the fact that he had counsel; but neither Mr. Geders nor any of the persons present were interested in having counsel aware of the meeting; and further made inquiry of Mr. Geders about Pedro Alvarez, who at that time was also represented by the same attorney who represented Mr. Geders, with a view in mind of finding out what information Mr. Geders could furnish to federal law enforcement officials. Mr. Blasingame said that no promises were made to Mr. Geders for the information he furnished, or that was to be furnished, since "this was just a preliminary meeting to find out what sort of things he could offer and what sort of investigation would go from there." (R. 738-740)(App. M 1-3). The court asked Mr. Blasingame whether there was any discussion about the pending case, any discussion about plea bargaining, leniency, etc., in response to which Mr. Blasingame said, "No, sir. No discussion other than we wouldn't discuss anything whatsoever to do with this case at all."

The following colloquy occurred between the court and the witness:

THE COURT: "Why would you think that Mr. Geders would come and talk to you?"

THE WITNESS: "Because of the amount of involvement he had with Pedro Alvarez and all the other activities."

THE COURT: "What would be the purpose if you weren't going to show him any kind of consideration for his talking to you -- what was in it for him to talk to you about? "

THE WITNESS: "He would be subject to all kind of indictments and prosecutions in the matters relating to Mr. Alvarez which were totally unrelated to this, your Honor."

THE COURT: "Well, was there some discussion then or impliedly or directly that there would be other charges dropped or not prosecuted or not brought?"

THE WITNESS: "Not to my recollection."

THE COURT: "What did you think as you sat there and talked to Mr. Geders, that he was thinking he would get for, in a sense, to use a colloquial expression, 'spilling the beans.'"

THE WITNESS: "I thought he would be helping in this Alvarez matter so as not to get indicted or tied up in any indictments of Pedro Alvarez."

THE COURT: "Well, did you represent to him that he was going to not be indicted then if he told you about Alvarez."

THE WITNESS: "No, sir."

THE COURT: "Well, did you make any representation to him that the information that he gave to you would not be used in this case in the prosecution of this case."

THE WITNESS: "No, sir. No, your Honor."

THE COURT: "Did anybody in your presence make such a representation?"

THE WITNESS: "No, your Honor. We didn't want to talk about this case in any way whatsoever."

THE COURT: "Why?"

THE WITNESS: "Because he was represented by an attorney in this case, and it had nothing whatsoever to do with Pedro Alvarez -- it was a completely different venture."

THE COURT: "Then you weren't planning then to use the information that you secured from him in that conversation in this case?"

THE WITNESS: "No, your Honor, we had no idea that we would get into this Pedro Alvarez business in the trial."

(R. 741,744)(App. N 1-4).

In my cross-examination of Mr. Blasingame, I asked him whether or not he did advise Mr. Geders and agree with him that there would be no discussion pertaining to the pending case, to which he stated: "Yes, sir." (R. 746, 747)(App. O 1,2).

Mr. Blasingame acknowledged that in connection with the first Geders' case he did not produce to his trial attorney as a part of the pre-trial discovery any statement, admission, or other advice given by Mr. Geders to Mr. Blasingame and the federal officials present at the meeting in question that was incriminatory of him, but he couldn't account for the reason why he failed to produce and provide that information to the defense attorney on that occasion. (R. 752)(App. P 1). The transcript of the first Geders' trial was presented to Mr. Blasingame to refresh his recollection as to a colloquy he had with Judge Ben Krentzman regarding this subject matter where this evidence was excluded, on which occasion he told Judge Krentzman that the reason why he had not produced these matters

pre-trial to Mr. Geders' attorney was because of the fact that at the meeting in question he avoided talking about the case in question whatsoever. (R. 753)(App. Q 1). Mr. Blasingame acknowledged that in the first Geders' case, when the question of the admissibility of these incriminatory statements were argued before Judge Krentzman, he said to the court that, "we have no constitutional question because the man specifically was not going to discuss this case at that time." (R. 755)(App. R 1).

The chief investigating agent for the United States of America, Lowell Miller, was called as a witness by the government to testify as to the circumstances under which the meeting in question took place and the discussion had between the parties. Mr. Miller testified of his practice with cooperating witnesses who have been indicted, and related that he would tell such cooperating witnesses that he could not make any promises, but he would bring the cooperation to the attention of the United States Attorney's Office, who would then determine whether that cooperation was to be presented to the court and given consideration at the time that the cooperating witness plead quilty to the pending charges against him and appeared before the court for sentencing. (R. 764, 765, 767) (App. S 1,2,3). Mr. Miller further related that he would discuss the effect of cooperation versus non-cooperation by a defendant as it related to the ultimate sentence to be received at the time of the disposition of the case pending against the defendant. Although Mr. Miller did not recall specifically what he told Mr. Geders before the meeting with Mr. Blasingame, he certainly confirmed the testimony of Mr. Geders regarding the

ultimate advice to the court of the nature and extent of Mr. Geder's cooperation insofar as the government's pending investigation of Pedro Alvarez for importation of marijuana and violation of the Internal Revenue Service laws. (R. 767-769)(App. T 1,2,3). Mr. Miller as asked, "well, what was your understanding of the reason for Mr. Geders cooperating about Alvarez -- why was he doing it?," to which he answered, "my understanding at that time were two reasons. He wanted to help himself in this case, and he would -- he had some kind of falling out with Mr. Alvarez and he was interested in getting Mr. Alvarez." (Emphasis added).

The court overruled the defendant's motions and permitted the government to inquire of the defendant as to his relationship with Mr. Alvarez and, particularly, the fact setting under which Mr. Alvarez' automobile was placed in Mr. Geders' name, Mr. Geders' employment at the "Sound Room" and Mr. Geders' travels to New York for Mr. Alvarez to convert large bills to small bills, although those matters were not testified to by the defendant during the course of his direct examination. (R. 782-784)(App. U 1,2,3).

Subsequently, as a part of the government's rebuttal case, over objection, Mr. Blasingame and Charles Hudson, who was employed by the United States Treasury Department, Bureau of Alcohol, Tobacco Tax & Firearms, were called in the presence of the jury to testify about the coversations they had with Mr. Geders at the United States Attorney's Office that is hereinabove described. (R. 1018-1024, 1037-1043)(App. V 1-14).

In cross-examination of the defendant regarding his taking money for Mr. Alvarez to New York to convert from large bills to small bills, the defendant testified that said transaction took place after November, 1972 and, as a matter of fact, took place in December, 1972. (R. 930-934)(App. W 1-5). And he further testified on cross-examination that Mr. Alvarez" Porsche automobile was placed in his name through inadvertence and because of the time of evening that he appeared at the dealer where the vehicle was to be picked up and for no other reason. (R. 905-930)(App. X 1-26).

REASONS FOR GRANTING THE WRIT

Rule 410 of the Federal Rules of Evidence and Rule 11(e)(6) provide in part as follows:

> "Statements made in connection with, or relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. . . ."

This Court, in Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), in addressing itself to the subject matter of "plea bargaining," held as follows:

> "This Record represents another example of an unfortunate lapse in orderly prosecutorial procedures, in part, no doubt, because of the enormous increase in the work load of the often understaffed prosecutor's offices. The heavy work load may well explain these episodes, but it does not excuse them. The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge was subjected to a full-scale trial, the States and

> the Federal Government would need to multiply by many times the number of judges and court facilities.
>
> "Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pre-trial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned."

Nevertheless, the increasing complexities of our society, and particularly the criminal process and proceedings, and more importantly the en banc Opinion of the Fifth Circuit Court of Appeals from which review is sought, has raised substantial doubt and ambiguity regarding the aforesaid propositions of law and the provisions of Rule 11(e)(6), Federal Rules of Criminal Procedure, as well as the proper means and circumstances under which the aforesaid rule and propositions of law are to be implemented and applied.

This case manifests what could be described as general confusion by the courts in connection with the circumstances under which Rule 11(e)(6), Federal Rules of Criminal Procedure, and the propositions of law as set forth in Santobello, supra, are to be applied. The significance of the issues raised herein are crystalized and put in their significant prospective by the Panel Opinion of the United States Court of Appeals for the Fifth Circuit, U.S.A. v. Geders, 566 F.2d 1227, 1229, 1230 (1978), which was reversed by an

en banc Opinion of the court, wherein the court stated that:

> "The parties to this appeal have vigorously contested the defendant's contention that the district court erred in permitting the use of plea-related discussions, and clash head-on as to the applicability of Santobello v. New York (404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427)(1971)), United States v. Herman, 544 F.2d 791 (5th Cir. 1977)), and Rule 11 of the Federal Rules of Criminal Procedure, to the facts of this case. When pared to the core, the government's argument is that statements made by the defendant at the meeting in May of 1973 are admissible because the statements were not in connection with or relevant to a plea or an offer to plead guilty, and that no agreement was struck with the defendant prior to the meeting as to the use of statements made by him during the meeting. It is necessary to closely analyze the teachings of Herman and Santobello before assessing the merits of the parties' contentions."

At the request of a United States Customs Officer, after indictment, the defendant met at the United States Attorney's Office with federal law enforcement officials and the Assistant United States Attorney who had presented the facts to the Grand Jury that resulted in the return of the Indictment charging him with the offenses for which he now stands convicted. At the inception of this meeting, the defendant was advised that there would be no discussion about any matters relating to the pending case and that nothing discussed would be used against the defendant. (R. 593-599, 726-728, 758, 764, 767-768)(App. D 1-14).

At the time in question, the defendant had counsel but did not bring his attorney to the meeting. (R. 759, 760)(App. Y 1, 2). Irrespective of the promises made by the government attorney at the meeting in question, during the trial the court denied the defendant's

Motion in Limine made prior to cross-examination and permitted the government to cross-examine the defendant about matters that bore upon his guilt or innocence in this case that were made known to the government by the defendant at the meeting in question. (R. 782-784)(App. U 1-3).

In the case of In the Matter of Joe Doe, 410 F.Supp. 1163 (D.C. Mich. 1976), the court held that once the prosecutor makes a bargain with a defendant that bargain is not only enforceable against the government but must be complied with, and there is no manner or means by virtue of which the government can reject that bargain once it has received any benefit in the form of information or action on the part of the defendant, and they are bound by said bargain. See Brook v. Varick, 243 S.E.2d 841 (S.Ct., W.Va., 1978).

It is obvious that the defendant's purpose for attending the meeting was to either have the pending charges dismissed or his sentence minimized by virtue of a plea bargain, and the government's purpose in having the meeting was to obtain information about the criminal activities that the defendant might be aware of; once again, in exchange for either a dismissal of the charges or a plea bargain limiting the exposure of the defendant to time in jail. In Santobello v. New York, 404 U.S. 257, at 260-262 (1971), this Court recognized that plea bargaining was an essential component of the administration of justice, and that as such, that process must be safeguarded from breach by the prosecutor. The Court compelled strict adherence and compliance with the implicit and explicit terms of plea bargaining even to the extent of the exclusion of

material and relevant evidence. In Santobello, supra, the Court held that:

> " . . . when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be the part of the inducement or consideration, such promise must be fulfilled." (Emphasis added).

In Brady v. U.S., 398 U.S. 742, 755 (1970), this Court declared that a guilty plea induced by misrepresentation, including unfulfilled promises, could not stand. Additionally, fundamental fairness and public confidence in government officials require that prosecutors be held to "meticulous standards of both promises and performance." Correale v. United States, 479 F.2d 944, 947 (1st Cir. 1973). Courts have afforded relief to defendants where prosecutors have made specific sentencing promises which were unfulfilled, since sentencing lies totally within the court's discretion. U.S. v. I. H. Hammerman, II, 528 F.2d 326 (4th Cir. 1975); Harris v. Superintendent, Va. State Penitentiary, 518 F.2d 1174 (4th Cir. 1975), even where one federal prosecutor promised immunity from federal prosecution outside his own jurisdiction, U. S. v. Carter, 454 F.2d 426 (4th Cir. 1972), en banc. See also, Geisser v. United States, 513 F.2d 862 (5th Cir. 1975).

The unequivocal and uncontradicted testimony of all the witnesses in connection with the appearance by the defendant at the United States Attorney's Office, before the federal prosecutor, after indictment, was that there was a specific agreement and understanding that there would be no inquiry in any way relating to the

pending indictment and nothing said relating to the pending indictment would be used against the defendant. (R. 741-744, 746, 747) (App. N 1-4, O 1, 2). At the time of the meeting, the defendant had counsel in connection with the pending charges, of which fact all parties were aware, and although the defendant waived counsel for the purpose of discussing matters unrelated to the pending indictment (R. 759, 760)(App. Y 1-2), he at no time waived counsel in regard to discussions in any way bearing upon the pending indictment. The admission in evidence for impeachment or otherwise of statements made relating to the pending indictment not only specifically contravened the agreement of the parties and plea negotiations, but also violated the defendant's Sixth Amendment rights to the presence and effective assistance of counsel during the course of the meeting to the extent that it related to the pending indictment. The Fifth Circuit Court of Appeals, in U. S. v. Daniels, 572 F.2d 535 (5th Cir. 1978), in addressing itself to the totality of the circumstances under which a defendant's statement was obtained by government agents and thereafter used against him, held as follows:

> "We are compelled to comment on Agent Shanks' actions, although they did not affect our decision. Shanks' first interview with the defendant may have come within the ambit of this Court's decision in U. S. v. Vasquez, 476 F.2d 730 (5th Cir. 1973). In Vasquez, the defendant was being held in custody on a state charge of attempted murder. While in custody, the defendant was interviewed by an F.B.I. agent concerning a rife that had been seized in a shooting. This Court held that Vasquez could validly waive his Miranda rights as to an investigation concerning the rifle, though the attempted murder was 'tangentially related' to possession of the rifle, and though the defendant

was represented by counsel on the state charge. The defendant's first statement related only to Shanks' gun investigation. Shanks' second interview with the defendant, however, had at least the facial characteristics of distorting the purpose underlying the holding in Vasquez. Although Agent Shanks purportedly took the second statement only as a part of his investigation concerning the sawed-off shotgun, the second statement contained only one paragraph about the gun incident. The only new information of substance elicited in the second statement concerned the driver's drug related purpose for making the trip. This purpose had no relevance to the gun. It related solely to the drug charges against the defendant. The government may not use Vasquez as a tool to extract statements from a defendant that will strengthen the government's case against him. This Court cannot, and will not, tolerate such prosecutorial misconduct."

In light of all of the foregoing circumstances, it was error of a constitutional dimension for the trial court to permit any inquiry to be made of the defendant regarding his meeting with the officials at the United States Attorney's Office and to permit the former federal prosecutor and others to testify as to any statement made by the defendant as it related to the pending case which they learned during the course of the meeting hereinabove referred to.

In the case of United States v. Herman, 544 F.2d 791 (5th Cir. 1977), the court held that the defendant's statements made during the course of a conversation with a postal inspector in which he sought to have the government drop charges against him in return for his guilty plea to robber charges, was inadmissible, even though the postal inspector had no authority to enter into such plea negotiations. Obviously, the Assistant United States Attorney handling the

prosecution of this case had authority to either dismiss the pending charges against the defendant in exchange for his cooperation in pending investigations or negotiate for a plea of guilty and enter into a plea bargain as it related to the sentencing of the defendant in this case. The question of authority of the prosecutor never comes into play in this case. The court noted that Federal Rule of Criminal Procedure, 11(e)(6) makes inadmissible any statement made "in connection with" any offer to plead guilty or nolo contendre to the charged crime or to any other crime, and that Rule 410, Federal Rules of Evidence, contains exactly the same provision. In discussing the significance of plea bargaining and its use, the court held that plea bargaining must be examined under the doctrine of "caveat prosecutor." (Emphasis added). The court went on to hold that:

> "Even before the enactment of Rule 11(e)(6), we held that plea-related statements are inadmissible, recognizing the inescapable truth that for plea bargaining to work effectively and fairly, a defendant must be free to negotiate without fear that his statements will later be used against him. In excluding a defendant's plea related statements, Judge Coleman wrote:
>
> > 'If, as the Supreme Court held in Santobello, plea bargaining is an essential component of justice, and, properly administered, is to be encouraged, it is immediately apparent that no defendant or his counsel will pursuch an effort if the remarks uttered during the course of it are to be admitted in evidence as proof of guilt. Moreover, it is inherently unfair for the government to engage in such an activity only to use it as a weapon against the defendant when negotiations fail.'"

The court ultimately concluded that "statements are inadmissible if made at any point during a discussion in which the defendant

seeks to obtain concessions from the government in return for a plea." (Emphasis added).

In rejecting the government's argument that the postal inspector did not have authority to enter into a plea negotiation, the Fifth Circuit Court of Appeals held that "the relevant factor is a defendant's perception of the government official's negotiating authority, not the official's actual authority. The twin goals of encouraging unrestrained plea negotiations and assuring fairness to defendants, dictate that any statements made by a defendant as part of an effort to reach a plea agreement must be excluded; it makes no difference that the defendant's effort is misguided because the official cannot or will not accept the offer."

Unquestionably, all parties attended the meeting with a view in mind of each coming away with some quid pro quo. The defendant was willing to go without his counsel, since he was assured that there would be no discussion relating to the pending case, and with a view in mind of offering information about Mr. Pedro Alvarez and others and their criminal activities in exchange for the dismissal of the charge or a plea of guilty and leniency.

A balanced system of criminal justice should not be made to function in the swampy terrain that has now been created by the en banc Opinion of the Fifth Circuit Court of Appeals from which review is sought, which Opinon totally disregards the purpose of the passage of the provisions of Rule 11(e)(6), Federal Rules of Criminal Procedure. The purpose is to encourage plea bargaining, a system thought by many, though others disagree, to be desirable.

In light of Santobello, supra, care must be taken lest roadblocks be set in the way of easy access to the system of criminal justice that is supposed to be open and even-handedly applied to all persons. This is not a case of a silent hope on the part of a defendant that is not communicated to the law enforcement officials to enhance his position, since it was the law enforcement officials' actions, statements and conduct that initiated the discussion which generated the evidence that resulted in the defendant's convictions. See, A.B.A. Minimum Standards for Criminal Justice Standards Relating to Plea of Guilty, § 340, at 78 (1968).

The position advanced by the defendant herein has been eloquently set forth by the court in the case of United States v. Smith, 525 F.2d 1017 (10th Cir. 1975), where the court, in addressing the same issue, held that:

> "The proceedings during the plea bargaining are generally recognized to be privileged and inadmissible. See, United States v. Ross, 493 F.2d 771, 775 (5th Cir. 1974), wherein it was said:
>
> '[I]t is immediately apparent that no defendant or his counsel will pursue (plea bargaining) if the remarks uttered during the course of it are to be admitted in evidence as proof of guilt.'
>
> "If the proceedings during plea bargaining could be introduced as inculpatory statements against the accused, there would not be very much plea bargaining. So, as a matter of policy, it is essential that it be considered as privileged. Indeed, such lawyers' discussions have always been considered privileged. See, McCormick, Evidence, § 274 (1972 Ed.). See also, Kercheval v. United States, 274 U.S. 220, 47 S.Ct. 582, 71 L.Ed. 1009 (1927), barring use of withdrawn plea of guilty against the defendant.[2] The American Bar Association Standards Relating to Pleas of Guilty recommends that plea discussions and plea agreements are not

to be admissible either for or against the defendant in any proceeding. 1968 Approved Draft, § 3.4, states:

> 'Unless the defendant subsequently enters a plea of guilty or nolo contendre which is not withdrawn, the fact that the defendant or his counsel and the prosecuting attorney engaged in plea discussions or made a plea agreement, should not be received in evidence against or in favor of the defendant in any criminal or civil action or administrative proceedings.'

> "There are state decisions which recognize that plea discussions are not admissible into evidence. See, State v. Byrd, 203 Kan. 45, 453 P.2d 22 (1969) (dictum). See also, People v. Hamilton, 60 Cal.2d 105, 32 Cal.Rptr., 383 P.2d 412 (1963).

> "Also, the Second Circuit, in the course of interpreting New York law, has stated that discussions during plea bargaining are not admissible. See, United States ex rel. Burke v. Mancusi, 425 F.2d 1061, 1062, n.2, 1063 (2d Cir. 1970)(habeas corpus proceedings).

> "The Supreme Court in Santobello v. New York, 404 U.S. 257, 261, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), recognized the efficacy of plea bargaining as a necessary part of the criminal procedure.

> "We do not argue either in favor or against plea bargaining in considering the present question except to state that if it is to be carried on, the discussions cannot be admissible in evidence, for to permit this would effectively thwart the effort."

The court ultimately concluded that the defendant, in light of this Court's opinion in Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), had a right to make his own defense and therefore could individually engage in plea bargaining efforts to which the provisions of Rule 11(e)(6), Federal Rules of Criminal Procedure, would apply.

The testimony of the federal investigator in charge of this case, Lowell Miller, presented to the government out of the presence of the jury initially, and thereafter in the presence of the jury, and the cross-examination of said government offical in the presence of the jury, fully support the defendant's contentions herein. Mr. Miller advised the court that he has a policy of advising defendants that if they were to cooperate, that cooperation would be made known to the prosecutor and, in turn, to the sentencing court. (R. 7620768)(App. Z 1-7). Mr. Miller also testified, and it is the only rational explanation for Mr. Geders to have met with him and the prosecutor, that Mr. Geders attended the meeting because he wanted "to help himself in this case" and he also had a falling-out with Mr. Alvarez. (R. 768, 769)(App. T 23)(Emphasis added). It is interesting that Mr. Miller could no- recall what he said to Mr. Geders after Mr. Geders told him that he want to cooperate with the federal officials and provide them with certain information in order to help himself in the pending matter. (R. 769)(App. T 3).

Over objection, Charles Hudson, an investigator for the United States Treasury Department, Bureau of Alcohol, Tobacco Tax & Firearms, and Oscar Blasingame, who at all material times was an Assistant United States Attorney, testified to facts and statements made to them in the meeting at the United States Attorney's Office previously discussed, all of which evidence violated the agreement of the parties and the authorities hereinabove set out, and the admission of which was highly prejudicial and constituted reversible error.

The en banc Opinion of the Fifth Circuit Court of Appeals relating to the application of Rule 11(e)(6), Federal Rules of Criminal Procedure, and Rule 410 of the Federal Rules of Evidence, creates a conflict within the circuits, and specifically a conflict between the authorities heretofore cited in the Second and Tenth Circuits, and the present position of the Fifth Circuit Court of Appeals as set forth in the en banc Opinion, and further constitutes an improper and unwarranted interpretation and application of the aforesaid rules. The criteria to be followed by the courts of this land in connection with the application of the aforesaid rules is best stated in the Panel Opinion in Geders, supra, at 1230, where the court held that:

> "The Court further stated that whether statements are made during the plea bargaining process according to hypertechnical distinctions, and that the defendant need not accompany all admissions with 'a preamble explicitely demarcating the beginning of plea discussions.' Id., at 797.
>
> "As Judge Goldberg so apply stated, "if Congress wanted plea bargaining to be formalized, ritualized, or structural, the rules could have so provided, but Congress, believing that plea bargaining is a necessary ingredient in criminal prosecutions of the magnitude we face, wanted an accused freely to discuss his or her plight, the probability of punishment, and the possible range thereof. Having embraked onthe plea bargaining route, Congress did not intent the accused to be convicted by the bargaining words Congress had encouraged him or her to utter. We cannot ascribe to Congress any intention to sandbag an accused in his or her plea bargaining sessions. The government, as one of the dancing partners, should not be able to lead its partner to a trap door on the dance floor.' Id, at 797, 798.

> "The rationale supporting a liberal interpretation of when plea bargaining commences is justified by the desire to encourage free and candid discussion between the government and the accused and to prevent plea bargaining from being used as a trap for the unwary."

The inability of a majority of the appellate court judges inthe en banc Opinion to determine the applicability of the principles announced by this Court in Santobello, supra, in light of Oregon v. Hass, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975); Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971); and Walder v. United States, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503 (1954), requires that this Court grant the Petition in order to obtain a clear understanding and application of the principles of law set out in the aforesaid opinions of this Court.

CONCLUSION

As previously set forth in this Petition, Petitioner respectfully submits that the decision and opinion of the Fifth Circuit Court of Appeals en banc in this case raises important questions affecting the administration of criminal law in the United States, and therefore Petitioner respectfully urges this Court to issue a Writ of Certiorari to the Circuit Court of Appeals for the Fifth Circuit so these issues may be more fully examined through briefs and argument and receive the benefit of this Court's judgment and final resolution.

ARNOLD D. LEVINE,
Attorney for Petitioner
Levine, Freedman, Hirsch & Levinson
Professional Association
725 E. Kennedy Boulevard
Tampa, Florida 33602
813/229-6585

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been furnished, by mail, to the United States Attorney's Office for the Middle District of Florida, Post Office Box 2841, Tampa, Florida 33601; Wade McCree, Jr., Solicitor General of the United States of America, Department of Justice, Washington, D. C.; and to Edward W. Wadsworth, Clerk of the United States Court of Appeals for the Fifth Circuit, 600 Camp Street, New Orleans, Louisiana 70130, this 9th day of February, 1979.

_____

ATTORNEY

Supreme Court, U. S.
FILED
FEB 22 1979
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-1245

JOHN A. GEDERS,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDICES TO PETITION

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Tampa, Florida 33602

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APPENDIX A

trict. We recognize that the issues involved are extremely difficult, and that the ultimate solutions will affect the lives of most individuals living within the communities involved. The district judge is a very learned, able, and conscientious judge, and is fully capable of handling these matters.

Reversed and Remanded.

UNITED STATES of America,
Plaintiff-Appellee,

v.

John A. GEDERS, Defendant-Appellant.

No. 77-5037.

United States Court of Appeals,
Fifth Circuit.

Jan. 31, 1978.

Rehearing En Banc Granted
March 27, 1978.

Defendant was tried with several codefendants and was convicted in the United States District Court for the Middle District of Florida at Tampa, George C. Young, Chief Judge, of conspiracy to import marijuana, importation of marijuana and possession of marijuana with intent to distribute. Defendant appealed. The Court of Appeals, Fay, Circuit Judge, held that: (1) the District Court erroneously permitted use of statements made by defendant which were plea related in that they were made by defendant during a meeting which he had attended with the expectation of receiving something in return for information he was willing to give though he was given *Miranda* warnings, and (2) introduction of the statements was not harmless beyond a reasonable doubt.

Reversed and remanded for new trial.

Dyer, Senior Circuit Judge, dissented and filed opinion.

1. Criminal Law ⇐273.1(2)

Congress, believing that plea bargaining is necessary ingredient in criminal prosecutions of magnitude being faced, wanted accused freely to discuss his or her plight, probability of punishment and possible range thereof, and did not intend accused to be convicted by bargaining words which Congress had encouraged him or her to utter. Fed.Rules Crim.Proc. rule 11(e)(6), 18 U.S.C.A.

2. Criminal Law ⇐406(4)

Rule that, generally, evidence of plea of guilty, later withdrawn, or plea of nolo contendere or of offer to plead guilty or nolo contendere or statements made in connection with, and relevant to, any such plea or offer is not admissible and judicial holding that statements are inadmissible if made at any point during discussion in which defendant seeks to obtain concessions from government in return for plea are not inapplicable merely because defendant did not actually offer to plead guilty at meeting at which statements were made. Fed. Rules Crim.Proc. rule 11(e)(6), 18 U.S.C.A.

3. Criminal Law ⇐273.1(2)

Judicial ruling that if government makes promises or inducements which result in guilty plea the promises must be fulfilled should apply regardless of whether defendant has offered to plead guilty. Fed. Rules Crim.Proc. rule 11(e)(6), 18 U.S.C.A.

4. Criminal Law ⇐406(2)

Where it was clear that Government elicited admissions in give-and-take of negotiating room, in that defendant attended meeting with assistant United States attorney and other government officials with expectation of receiving something in return for information he was willing to give, and there being insufficient evidence to dispel likelihood that Government would have reduced charges against defendant or even dropped them altogether if he had provided sufficient evidence to build good case against another accused, admissions were plea related and were not admissible in prosecution against defendant. Fed.Rules Crim.Proc. rules 11, 11(e)(6), 18 U.S.C.A.

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5. Criminal Law ⇐406(2)

Only instances in which plea-related statements are admissible are prescribed in criminal rule. Fed.Rules Crim.Proc. rules 11, 11(e)(6), 18 U.S.C.A.; Federal Rules of Evidence, rule 410, 28 U.S.C.A.

6. Criminal Law ⇐406(2)

That assistant United States attorney formally informed defendant of his *Miranda* rights did not make admissible statements thereafter given by defendant which were plea related in that they were made at meeting which he attended with expectation of receiving something in return for information he was willing to give. Fed. Rules Crim.Proc. rule 11(e)(6), 18 U.S.C.A.

7. Criminal Law ⇐1169.12

In prosecution for conspiracy to import marijuana, importation of marijuana, and possession of marijuana with intent to distribute, erroneous admission of plea-related statements made by defendant was not harmless beyond reasonable doubt in view of fact that other testimony introduced by Government was not shown to be alone sufficient to rebut entrapment defense. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 1002(a), 1010(b), 21 U.S.C.A. §§ 841(a)(1), 952(a), 960(b); U.S.C.A.Const. Amend. 6.

8. Criminal Law ⇐594(1)

District court did not err in refusing defense motion for continuance in order to take pretrial deposition.

Arnold D. Levine, Tampa, Fla., for defendant-appellant.

John L. Briggs, U. S. Atty., Jacksonville, Fla., Anthony J. LaSpada, Asst. U. S. Atty., Tampa, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before BROWN, Chief Judge, DYER, and FAY, Circuit Judges.

FAY, Circuit Judge:

After remand from the United States Supreme Court,[1] the defendant-appellant, John A. Geders, was tried with several co-defendants and was convicted of conspiracy to import marijuana, importation of marijuana, and possession of marijuana with intent to distribute in violation of 21 U.S.C. §§ 952(a), 960(b), and 841(a)(1). Geders testified in his own behalf at the trial and raised the defense of entrapment. The government was permitted to cross-examine Geders and to introduce rebuttal testimony concerning post-indictment statements made by Geders at a meeting with the Assistant United States Attorney and federal investigators in May, 1973 in order to establish his predisposition to engage in narcotic-related activities and to attack his credibility as a witness. Geders vigorously objected to the use of statements made by him during this meeting on the ground that such statements were made during the early stages of the plea bargaining process.

We have concluded that the trial court erroneously permitted use of statements made by Geders during the meeting in May of 1973, and because introduction of these statements was not harmless beyond a reasonable doubt, we remand the case to the trial court for further proceedings consistent with this opinion.

I. FACTS

The facts, considered in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), indicate that the defendant Geders was involved in a conspiracy with Randy Kilgore, James Mahoney, Michael Fink, Fred Fink, and Stephen Patrick to transport a substantial quantity of marijuana into the United States from Colombia, South America. Formation of the conspiracy and acts in furtherance thereof took place between September 1, 1972, and November 26, 1972.

1. The defendant's first conviction arising from the facts of this case was reversed by the Supreme Court because he was deprived of assistance of counsel in violation of the Sixth Amendment. *Geders v. United States*, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976).

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During October and November of 1972 the participants in the conspiracy traveled from Tampa, Florida, to Jacksonville and Daytona Beach, Florida, to ready plans for importation of the marijuana. Geders also flew to Colombia, South America, to meet with Pedro Davilla, the contact abroad, who was a Colombian citizen and a fugitive from United States jurisdiction. In late October or early November Randy Kilgore met with an individual named David Butler in Miami, Florida, and agreed to pay Butler $10,000 if he would pilot a small plane to Colombia to pick up the marijuana. Unbeknownst to the conspirators, Butler was a government informant and immediately informed Customs officials of the proposed plan. Butler was instructed to cooperate in the plan and to keep Customs informed. The conspirators agreed that the plane would depart from Tampa on November 26, 1972, and would land in Lehigh Acres, Florida, later the same day upon return from Colombia.

The plane departed from Tampa at approximately 5:00 A.M. on November 26, 1972, with Geders and James Mahoney accompanying Butler, the pilot-informant. The plane flew to Colombia, and, after loading approximately 1000 pounds of marijuana, returned to Lehigh Acres between 8:00 P.M. and 9:00 P.M. on the evening of the 26th. While the plane was en route to Colombia, Customs officials began surveillance of the landing area at Lehigh Acres in preparation for seizure of the contraband and the participants upon their return from Columbia. All of the conspirators were in custody by the following day.

The meeting between Geders, Assistant United States Attorney Oscar Blasingame, Customs officer Lowell Miller, Charles Hudson of the Bureau of Alcohol, Tobacco, and Firearms, and certain other government officials took place in May of 1973. Although the meeting took place after indictment at a time when Geders was represented by counsel, his attorney was not present at his insistence.[2] Blasingame informed Geders of his *Miranda* rights and that the government wished to discuss the activities of Pedro Alvarez and did not wish to discuss Geders' pending case. Specifically, Blasingame informed Geders that "there would be no discussion about any matters related to the pending case." Geders then related to the investigators that he had traveled to New York to convert large bills into small bills for Alvarez and that title to a Porsche automobile owned by Alvarez had been placed in his name.

Prior to testifying on his own behalf, Geders moved in limine to exclude any cross-examination concerning statements made by him during the meeting in May of 1973. The court deferred ruling on the motion until completion of direct examination, in which Geders set forth the defense of entrapment. The court then denied Geders' motion and permitted cross-examination concerning statements made by him during the meeting as evidence for the jury to consider regarding the issue of whether Geders possessed a predisposition to commit the offenses in question and to attack his credibility. The court also permitted the government to introduce rebuttal testimony by Assistant United States Attorney Blasingame and Special Agent Hudson concerning statements made by Geders at the May, 1973, meeting.

II. MERITS

The parties to this appeal have vigorously contested the defendant's contention that the district court erred in permitting the use of plea-related discussions, and clash head on as to the applicability of *Santobello v. New York*,[3] *United States v. Herman*,[4] and Rule 11 of the Federal Rules of Criminal Procedure[5] to the facts of this case. When pared to the core, the government's argument is that statements made by the defendant at the meeting in May of 1973 are admissible because the statements were not in connection with nor relevant to a plea or an offer to plead guilty, and that no agreement was struck with the defendant prior to the meeting as to the use of statements made by him during the meeting. It is necessary to closely analyze the teachings of *Herman* and *Santobello* before assessing the merits of the parties' contentions.

2. Geders did not want his attorney present because he feared that he might be in danger if his attorney knew of the meeting since he believed that his attorney also represented Pedro Alvarez, whose activities were the primary subject of discussion. Although the government endeavors to establish that the defendant voluntarily waived counsel, we opine that the waiver of counsel argument does not relate to the primary issue before this court.

3. 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971).

4. 544 F.2d 791 (5th Cir. 1977).

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In *Herman*, this court was confronted with the issue of whether Rule 11(e)(6) of the Federal Rules of Criminal Procedure should be construed to exclude statements made by an accused murderer to postal inspectors to the effect that he would plead guilty to robbery and produce the gun if the murder charges would be dropped.[6] The focal issue in *Herman*, as in the case at bar, was whether the defendant's statements were in connection with and relevant to the plea bargaining process. Judge Goldberg, in his well reasoned opinion held[7] that:

> . . . . Statements are inadmissible if made at any point during a discussion in which the defendant seeks to obtain concessions from the government in return for a plea. 544 F.2d at 797.

The Court further stated that whether statements are made during the plea bargaining process is not to be determined according to hypertechnical distinctions and that the defendant need not accompany all admissions with a "preamble explicitly demarcating the beginning of plea discussions." *Id.* at 797.

[1] As Judge Goldberg so aptly stated:

> If Congress had wanted plea bargaining to be formalized, ritualized or structural, the rules could have so provided. But Congress, believing that plea bargaining is a necessary ingredient in criminal prosecutions of the magnitude we face, wanted an accused freely to discuss his or her plight, the probability of punishment and the possible range thereof. Having embarked on the plea bargaining route, Congress did not intend the accused to be convicted by the bargaining words Congress had encouraged him or her to utter. We cannot ascribe to Congress any intention to sandbag an accused in his or her plea bargaining sessions. The government, as one of the dancing partners, should not be able to lead its partner to a trap door on the dance floor.

Id. at 797, 798.

The rationale supporting a liberal interpretation of when plea bargaining commences is justified by the desire to encourage free and candid discussion between the

5. Rule 410 of the Federal Rules of Evidence is identical in wording. These rules provide:

> Except as otherwise provided in this paragraph, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

6. The government in *Herman* argued that the statements made by the defendant to the postal inspectors could not have been in connection with an offer to plead guilty because the inspectors lacked authority to negotiate such a plea. The court rejected the government's argument holding that the dispositive issue is whether the defendant perceived that the government officials possessed negotiating authority and not whether they actually possessed such authority. We opine that it can not be disputed that Geders perceived that the Assistant United States Attorney possessed authority to negotiate.

7. Judge Gee, specially concurring in *Herman*, stated that much of Judge Goldberg's majority opinion is pure dicta. Although we express no opinion as to the validity of Judge Gee's assessment of the majority opinion in *Herman*, we accept Judge Goldberg's language because his reasoning is compelling and because the issue at hand has not been foreclosed by contrary authority.

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government and the accused and to prevent plea bargaining from being used as a trap for the unwary. With these goals in mind, we interpret *Herman* to say that when the government and the defendant discuss his criminal activities, each side entertaining the desire to receive a quid pro quo, the government does so at its own risk that statements made by the defendant will not be admissible against him at trial. The government's contention that plea bargaining has not commenced is to be evaluated according to the standard of "caveat prosecutor".[8]

The Supreme Court in *Santobello* expressly recognized that promises made by the government must be fulfilled. *Accord, United States v. Millet*, 559 F.2d 253 (5th Cir. 1977). In *Santobello*, the defendant was indicted on two gambling charges to which he entered pleas of not guilty. The Assistant District Attorney then agreed that if the defendant would plead guilty to a lesser-included offense the prosecutor would make no recommendation as to the sentence to be imposed. Pursuant to the agreement the defendant withdrew his not guilty pleas and entered a plea of guilty to the lesser-included offense. At the sentencing hearing, a new prosecutor replaced the Assistant District Attorney and recommended the maximum sentence. The sentencing judge imposed the maximum sentence, stating on the record that the sentence was arrived at independent of the prosecutor's recommendation. Notwithstanding the effort by the trial judge to alleviate the effect of the broken promise, the Supreme Court vacated the judgment and remanded the case to the state court for further proceedings. The court specifically held that if the government makes promises or inducements which result in a guilty plea, the promises must be fulfilled. The premise underlying this rule of law as we understand it, is that all admissions made by the defendant during the course of negotiations are conditioned upon the defendant receiving that which he has bargained for.

[2, 3] The task now at hand is to apply the law to the facts of this case. At the outset, we are confronted with the government's contention that because Geders did not actually offer to plead guilty at the meeting neither *Herman* nor Rule 11(e)(6) of the Federal Rules of Criminal Procedure is applicable to this case. We hold that this contention is without merit because we do not choose to draw the line so hard and fast. To hold that statements made by a defendant during a meeting with government officials are plea-related only if the defendant actually offers to enter a plea would encourage the "shouted offer to plead"[9] only "after the horse is out of the barn"[10] denounced by Judge Gee in his concurring opinion in *Herman* and by the government in its brief. More importantly, such a holding would elevate form over substance. Although the facts of *Santobello* likewise evince an actual guilty plea, the holding of *Santobello* that the government is bound by its agreement with the defendant should apply regardless of whether the defendant has offered to plead guilty.

[4, 5] Having concluded that statements made by a defendant can be protected by the rule forbidding the use of statements made during plea bargaining even though no actual offer to plead appears in the record, we turn to the question of whether Geders' statements are entitled to such protection. It can not be disputed that Geders attended the meeting with the desire to receive something in return for the information he supplied to the government. The record is unclear concerning the nature of the carrot held out to the defendant as the testimony of the government's witnesses is in dispute,[11] but in any event, it is not our

8. This phrase was coined by my learned colleague, Judge Goldberg, at 544 F.2d 796 and means "let the prosecutor beware."

9. 544 F.2d at 800.

10. *Id.*

11. Assistant United States Attorney Blasingame testified that Geders was willing to discuss his activities with Pedro Alvarez because he wanted to avoid indictment for these Alvarez-related activities. Blasingame further testified that no promises were made to Geders other than that there would be no discussion of his pending case. Customs officer Miller testified that although he could not recall specifically what he promised Geders prior to the meeting, if anything, his usual practice was to inform the cooperating defendant that although he couldn't make any promises, the defendant's cooperation would be made known to the United States Attorney's office. Contrary to Blasingame's understanding as to why Geders was willing to discuss his activities with Alvarez, Miller testified that he understood Geders' motivation to be two-fold. First, Geders wanted to help himself out in his pending case, and second, Geders wanted to retaliate against Alvarez due to the falling out which had occurred between them. Geders testified that his sole motivation was to help himself out in his present case.

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duty to resolve this factual dispute. It is our responsibility, however, to determine whether plea bargaining had commenced. If so, the defendant's inculpatory statements are inadmissible in this case.

Geders attended the meeting with the expectation of receiving something in return for the information he was willing to give. There is insufficient evidence in the record to dispel the likelihood that the government would have reduced the charges against Geders or even dropped the charges altogether if he had provided sufficient evidence to build a good case against Alvarez. Customs officer Miller testified that he understood one of Geders' motives for attending the meeting to be to help himself in his pending case. With this factual setting in mind, it is clear that the government elicited the admissions that were utilized against Geders in the give-and-take of the negotiating room. We refuse to require the defendant to use a preamble to demarcate the beginning of plea bargaining. This was clearly denounced in *Herman*. Measured against the standard of caveat prosecutor, we conclude that Geders' statements were sufficiently connected with and relevant to the plea bargaining process that they are within the ambit of Rule 11(e)(6) of the Federal Rules of Criminal Procedure as interpreted by this court in *Herman*.[12] The application of a more exacting standard could greatly decrease the utility of the plea bargaining process, recognized in *Santobello* as being an essential component of the administration of criminal justice. We therefore conclude that the district court erred in permitting the use of Geders' statements as these statements were inadmissible for any purpose in this case.[13]

We further conclude that even if we were to take the position that Geders' statements were not in connection with and relevant to plea bargaining, the defendant's conviction must be reversed because the government violated the basic principle of *Santobello* in using his statements against him. The government acknowledged in their brief and at the trial that the meeting with Geders was arranged so that information pertaining to the activities of Pedro Alvarez could be acquired. The government wanted to short-cut the investigatory process by taking advantage of the information Geders

12. This court's recent case of *United States v. Robertson*, 560 F.2d 647 (5th Cir. 1977), is distinguishable because the inculpatory statements made by the defendant in *Robertson* were for the purpose of obtaining leniency for a third party and not for the defendant. The statements thus were not in connection with and relevant to plea bargaining. This court did recognize in *Robertson* that:

> In situations where the defendant enters into negotiations about his own plea, Fed.R. Crim.P. 11(e)(6) and Fed.R.Ev. 410 render inadmissible testimony relating to such negotiations, if the negotiations fail and the defendant goes to trial. 560 F.2d at 651.

13. We find no merit in the government's argument that the statements are admissible for impeachment purposes under *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971), and its progeny. The only instances in which plea-related statements are admissible are prescribed in Fed.R.Crim.P. 11(e)(6). The Rule provides in pertinent part:

> . . . However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

Nor can the government find solace in the broader provision of proposed Rule 410 of the Federal Rules of Evidence which was superseded by Rule 11(e)(6) of the Federal Rules of Criminal Procedure and never came into effect. *See United States v. Martinez*, 536 F.2d 1107 (5th Cir. 1976).

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could supply. This is a commendable method but, as in the case at bar, is often conditioned upon the government making concessions in return. As we have stated, the evidence is in dispute as to the precise nature of the inducement, if any, offered to Geders. The government does not dispute, however, that Geders was promised that his pending case would not be discussed at the meeting. We are firmly of the opinion that under the facts of this case, wherein the defendant met with the Assistant United States Attorney and other government investigators for the purpose of giving information which the government wanted in a compelling way in return for a quid pro quo, that promising him his pending case would not be discussed is indistinguishable from promising him that anything he says at the meeting will not be used against him in that case. The court in *Santobello* left no doubt as to the binding nature of promises made by the government in return for a guilty plea. The rule of *Santobello* dictates that the government likewise be bound by its promises that statements made by the defendant will not be used against him. This is merely the application of *Santobello* in a factual setting divorced from the confines of plea bargaining and serves to promote fairness in the administration of criminal justice.

[6] We are mindful that the record supports a factual finding that Assistant United States Attorney Blasingame went through the formal act of informing Geders of his *Miranda* rights. However, we refuse to sanction governmental conduct consisting of the giving of a promise (that nothing the defendant says will be used against him), which, when followed by a ritualistic retraction, places the government in the position of "heads we win, tails you lose."

[7] We simply cannot say that the error committed by the district court was harmless beyond a reasonable doubt within the meaning of *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Although the record reflects that the government introduced other testimony concerning the subject matter contained in Geders' statements, we cannot conclude that this testimony alone would be sufficient to rebut the defendant's entrapment defense.

[8] The defendant has raised several other issues in this appeal. He contends that the district court erred in denying his motion to take the pretrial deposition of a witness who resided outside the United States, in refusing to permit him to present surrebuttal testimony, and in denying his motion for mistrial due to alleged prosecutorial misconduct in failing to produce material bearing on Randy Kilgore's status as a confidential informant. The crux of this final contention is that he was deprived of effective cross-examination of Kilgore. We find no merit in defendant's contention that the district court erred in refusing his motion for a continuance in order to take the pretrial deposition. We need not reach defendant's contention that the district court erred in refusing to permit him to present surrebuttal testimony as we have determined that the statements made by Geders were inadmissible, and of course, will likewise be barred in any further proceedings. Finally, we express no opinion as to the alleged failure to make the disclosure as to Kilgore's status as a confidential informant as the defendant now has access to the material in question and will have this material available upon remand of this case.

CONCLUSION

We conclude that the district court committed reversible error by permitting the introduction of the defendant's statements because the statements were plea-related, and second, because the government violated its duty under *Santobello* by using said statements at the trial. Accordingly, the judgment against the defendant is reversed and this case is remanded for a new trial.

REVERSED & REMANDED.

DYER, Senior Circuit Judge, dissenting:

I respectfully dissent.

In this unique situation the defendant, after indictment, voluntarily appeared at the prosecutor's office, voluntarily waived the presence of his counsel, and after a *Miranda* warning, voluntarily gave information concerning his activities in an unrelated criminal matter that would incriminate a third party (Alvarez) who the government was about to prosecute. None of the information disclosed by the defendant was, at that time, relevant to the prosecution of the defendant in this case. In fact, the government attorney refused to discuss anything that bore upon this case with the defendant. The information became relevant at the trial, however, because the defendant raised the defense of entrapment and because his testimony was inconsistent with his prior statements, thus raising a credibility issue.

There is not one iota of a suggestion that there was any plea bargaining in this case. The defendant never made a tentative or firm offer to plead prior to or during the conference, and indeed, during formal plea bargaining before trial no agreement for a plea was reached. The prosecutor was properly adamant from the very beginning of the conference ". . . that we would not discuss anything whatsoever to do with this particular case . . .." The most charitable view of the defendant's characterization of his intentions is that by being helpful in giving information about his dealings with Alvarez in an unconnected matter it could help him in this case. The majority votes that there is no evidence that the government offered to discuss this case, and it is undisputed that the defendant never wavered in his steadfast position that he would go to trial. We are thus left to speculate how the defendant thought the information would help him in this case (although it might well have helped him extricate himself from charges of being a co-conspirator with Alvarez in an unrelated proceeding). The most favorable inference that may be drawn for the defendant is that someone would tell the Judge at the time of sentencing, if, as and when the defendant was convicted in this case, that he had cooperated with the authorities concerning an unrelated prosecution of another individual.

To transpose the information given by the defendant that was not at that time relevant to these proceedings to a plea bargain that would bar the information when it was attempted to be elicited because it became relevant rebuttal evidence when the defendant invoked the defense of entrapment and put his credibility in issue is, in my opinion, an unwarranted extension of, or perhaps obliterates any standard for plea bargaining.

I am unwilling to stretch the holdings in the factually dissimilar cases of *Santobello* and *Herman* to the precise issue raised here. The focus in *Herman* centered on concessions from the government in return for a plea. It had nothing to do with a defendant who insists on a trial and then objects to evidence which is made admissible, not to prove his guilt, but to rebut his claim of innocent involvement and credibility.

As the majority recognizes, in *Santobello* the Court held that if the government makes promises which result in a guilty plea, the promise must be fulfilled. The premise, drawn by the majority is sound only if my parenthetical interpolation is read into it, "that all admissions made by the defendant during the course of negotiations [for a guilty plea] are conditioned upon the defendant receiving that which he bargained for." In the context of this case, there were no negotiations for a guilty plea. Moreover, neither party at the time of the conference considered the information that the defendant disclosed to be relevant to his guilt or innocence. It became relevant only when the defendant chose to raise the issue of entrapment and put his credibility on the line. Once the defendant took this tack it would pervert justice to permit him to testify inconsistently or even perjuriously without the risk of confrontation and thus be in a position to withhold the full facts from the jury's consideration.

In an analogous but even factually stronger case than the one *sub judice* the Court said:

> It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite

another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradictions of his untruths.

[T]here is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility.

Walder v. United States, 1954, 347 U.S. 62, 65, 74 S.Ct. 354, 356, 98 L.Ed. 503.

I agree with the view expressed by Judge Young when he denied the defendant's motion *in limine*. He said "[I]f there is any principle that must govern the administration of justice, it is that the truth must out. If the Court directly or indirectly permits falsehood knowingly to go to the trier of the facts, then the administration of justice has been distorted to the point that it is completely ineffective." This is simply a reaffirmation of the well established principle that "Every defendant is privileged to testify in his own defense, or refuse to do so. But that privilege cannot be construed to include the right to commit perjury." *Harris v. New York*, 1971, 401 U.S. 222, 225, 91 S.Ct. 643, 645, 28 L.Ed.2d 1 for "[w]e are, after all, always engaged in a search for the truth in a criminal case so long as the search is surrounded with the safeguards provided by our Constitution." *Oregon v. Hass*, 1975, 420 U.S. 714, 722, 95 S.Ct. 1215, 1221, 43 L.Ed.2d 570.

I agree with the majority that there is no merit in the defendant's contention that there was error in the denial of his motion for continuance. I am also convinced that the defendant's argument that the district court abused its discretion in refusing to permit him to present surrebuttal evidence is groundless. "[I]t is within the trial court's sound discretion to deny petitioners right to a rebuttal witness, and on the record before us we find no abuse of discretion." *Hampton v. Hauck*, 5 Cir. 1967, 383 F.2d 389.

Finally, it is enough to say that any failure of the government to disclose Kilgore's status as a confidential informant was cured by the government making available the material in question during the course of the trial and in time for the defendant to fully utilize it. *United States v. Decker*, 5 Cir. 1976, 543 F.2d 1102, 1105.

I would affirm the judgment of conviction.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before BROWN, Chief Judge, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, MORGAN, CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN and VANCE, Circuit Judges.

BY THE COURT:

A majority of the Judges in active service, on the Court's own motion, having determined to have this case reheard en banc,

IT IS ORDERED that this cause shall be reheard by the Court en banc with oral argument. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

John M. WILSON, Plaintiff-Appellant,

v.

FIRST HOUSTON INVESTMENT CORPORATION et al., Defendants-Appellees.

No. 75-3422.

United States Court of Appeals, Fifth Circuit.

Feb. 2, 1978.

Rehearing and Rehearing En Banc Denied March 7, 1978.

Investor sued his investment adviser to recover for alleged violations of Investment

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1-10-79 denied

APPENDIX B

UNITED STATES of America, Plaintiff-Appellee,

v.

John A. GEDERS, Defendant-Appellant.

No. 77-5037.

United States Court of Appeals, Fifth Circuit.

Dec. 11, 1978.

Defendant was convicted in the United States District Court for the Middle District of Florida, at Tampa, George C. Young, J., of conspiracy to import marijuana and other drug offenses, and a panel of the Court of Appeals reversed, 566 F.2d 1227. On review en banc of the panel's decision, the Court held that the record did not show that defendant had a reasonable subjective expectation that plea negotiations were in progress when he made certain statements used against him in his later prosecution, and that error therefore did not occur when such statements were admitted into evidence.

Affirmed.

Fay, Circuit Judge, dissented and filed statement in which Brown, Chief Judge, and Goldberg, Circuit Judge, concurred.

Criminal Law ⇐406(2)

Record did not demonstrate that drug offense suspect had reasonable subjective expectation that plea negotiations were in progress when, after his arrest, he made certain statements to government agents which were later introduced into evidence against him in his trial; use of such statements to rebut suspect's entrapment claim therefore did not result in error. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 1002(a), 1010(b), 21 U.S.C.A. §§ 841(a)(1), 952(a), 1010(b); Fed.Rules Crim.Proc. rule 11(e)(6), 18 U.S.C.A.

Appeal from the United States District Court for the Middle District of Florida.

Before BROWN, Chief Judge, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, CLARK, GEE, TJOFLAT, HILL, FAY, RUBIN, and VANCE, Circuit Judges.*

PER CURIAM:

John A. Geders was convicted of conspiracy to import marijuana, importation of marijuana, and possession of marijuana with intent to distribute in violation of 21 U.S.C. §§ 952(a), 960(b), and 841(a)(1). At his trial Geders raised the defense of entrapment and testified on his own behalf to establish that defense. The government attempted to rebut Geders' entrapment claim by introducing statements made by Geders to government officials concerning narcotics-related activities to attack the credibility of his testimony by demonstrating that his past conduct showed a predisposition to engage in the crime charged. The statements introduced related to Geders' illicit associations with one Pedro Alvarez, and had been made at a meeting between Geders and government officials seeking information concerning Alvarez' activities. The meeting between Geders and government prosecutors and investi-

* Judge Roney did not participate in the consideration of this case.

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gatory officials, at which the challenged statements were made, took place after Geders had been indicted on the marijuana importation charges.

On appeal, Geders objects to the use of those statements on the grounds that they were made during a plea bargaining process and thus were barred by Fed.R.Crim.P. 11(e)(6). Geders also asserts that they were introduced in contravention of a government promise to him that nothing said at the meeting would be used against him. Geders argues that use of the statements was a violation of the rule that government promises must be kept, laid down in *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971).

A panel of this court reversed and remanded the judgment of conviction against Geders, 566 F.2d 1227, holding that statements made by Geders which implicated him in other criminal conduct were admitted contrary to the provisions of Rule 11(e)(6) because they were made in connection with, and relevant to, a plea of guilty or an offer to plead guilty; or, alternatively, if not barred by Rule 11(e)(6), Geders' statements were admitted in violation of the principle laid down in *Santobello*.[1] We agreed to review en banc the panel's decision, 566 F.2d 1235.

I.

The issue of whether Geders' statements had been made "in connection with, and relevant to, an offer to plead guilty" was not presented to the trial court, so we do not have the benefit of a trial court's finding on this appeal. Geders testified that his making of the statements was initiated by an agent of the United States who stated that he wanted information concerning Alvarez and who "talked about helping me out in my case." In response to the question, "Were you going to plead guilty?", Geders replied, "He [the agent] mentioned something about pleading and I said that I didn't want to because I felt I was innocent of the charge in my case. I would work out and cooperate but not by pleading guilty." Geders also testified that the agent proposed to talk to the judge about dropping the charges against him and that he, Geders, "told him that I wouldn't plead guilty, that they would have to drop the charges altogether, and he said he would have to talk to the judge and that he couldn't promise me that himself." Geders did tell the prosecutor about activities of himself and Alvarez under an arrangement variously described as a promise that nothing said would be used against him and as a commitment that his pending case would not be discussed.

The panel majority relied upon *United States v. Herman*, 544 F.2d 791 (5th Cir., 1977), in concluding that the use of Geders' statements was barred by Rule 11(e)(6), and in so doing stated:

> [W]e interpret *Herman* to say that when the government and the defendant discuss his criminal activities, each side entertaining the desire to receive a quid pro quo, the government does so at its own risk that statements made by the defendant will not be admissible against him at trial. The government's contention that plea bargaining has not commenced is to be evaluated according to the standard of "caveat prosecutor."

Our recent opinion in *United States v. Robertson*, 582 F.2d 1356 (5th Cir., 1978), controls the application of Rule 11(e)(6). There this court said:

> The trial court must apply a two-tiered analysis and determine, first, whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion, and, second, whether the accused's expectation was reasonable given the totality of the objective circumstances.

Where the record, as here, does not disclose a clear expression on the part of the accused to pursue plea negotiations, any after-the-fact expressions of intent must be carefully evaluated. *Id.*, 582 F.2d at 1367. The court must focus searchingly on the record to determine whether the accused reasonably had a subjective intent to negotiate a plea. *Id.*, 582 F.2d 1367.

When the *Robertson* standard is applied to the objective circumstances disclosed by this record, it is patent that Geders could have had no reasonable subjective expectation that plea negotiations were in progress. Rather, Geders himself asserted positively that they were not. Accordingly, the portion of the panel opinion which applied *Herman* to find a violation of Rule 11(e)(6) is vacated.

II.

As to the applicability of the principle announced in *Santobello* in this case in light of *Oregon v. Hass*, *Harris*, and *Walder*, (*supra*, note 1) the court en banc is evenly divided; therefore, the judgment of conviction of the district court is affirmed by operation of law.

AFFIRMED.

FAY, Circuit Judge, with whom BROWN, Chief Judge, and GOLDBERG, Circuit Judge, join, dissenting:

I respectfully dissent for the reasons set forth in the panel opinion found at 566 F.2d 1227.

1. The dissent to the panel opinion took the position that Geders' statements were not barred by Rule 11(e)(6) and, even if they were within the ambit of *Santobello*'s bar, they were not improperly admitted in Geders' case under the rationale of *Oregon v. Hass*, 420 U.S. 714, 722, 95 S.Ct. 1215, 1221, 43 L.Ed.2d 570 (1975); *Harris v. New York*, 401 U.S. 222, 225, 91 S.Ct. 643, 645, 28 L.Ed.2d 1 (1971); and *Walder v. United States*, 347 U.S. 62, 65, 74 S.Ct. 354, 356, 98 L.Ed. 503 (1954).

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 77-5037

COURT OF APPEALS
FILED
JAN 10 1979
EDWARD W. WADSWORTH

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN A. GEDERS,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

ON PETITION FOR REHEARING

(January 10, 1979)

Before BROWN, Chief Judge, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, CLARK, GEE, TJOFLAT, HILL, FAY, RUBIN, and VANCE, Circuit Judges.*

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

Judges GOLDBERG and FAY dissent.

ENTERED FOR THE COURT:

United States Circuit Judge

*Judge Roney did not participate in the consideration of this case.

Form 703-2

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APPENDIX C

Would Your Honor consider adjourning the Jury for the noon hour at this time?

THE COURT: Very well. Members of the Jury, I will excuse you at this time until one thirty at which time I will ask you to be back in the Jury room.

Do not in any way violate the instructions I have given to you each time you have left the Jury box.

You are excused until one thirty.

... Thereupon, the Jury retired at 11:50 o'clock a.m.

MR. LEVINE: Your Honor, at this time the Defendant moves for a mistrial on the basis of the last two questions related to large sums of money carried to New York for Pedro Alvarez, it having come out, and there was nothing I was able to do about it. The witness said he had nothing to do with it. It is the same context that came before Judge Krentzman who excluded it, unless the Government is able to prove that that is true. I submit it is prejudicial, inflammatory and improper, the citing of which I can refer to the record -- I need a few minutes, the citing of which this matter was attempted to be brought out

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by the Government in the last trial with Mr. LaSpada being one of the participants in that trial was in rebuttal to show predisposition and knowledge of the participation in criminal activities relating to marijuana. The Government called a couple of agents and attempted so to do, to testify to a conversation that was had between John Geders out of the presence of his attorney with Assistant United States Attorney and certain Government agents with specific understanding and agreement that none of those conversations or discussions would in any way be used at any time in connection with the pending prosecution of his case.

Those representations were acknowledged in the record and are acknowledged in the record, and I can find it during the lunch recess, by Government counsel, as to that. It was a discussion between Mr. Geders, the Assistant United States Attorney and the Government agent that nothing said there would be used in connection with any prosecution or otherwise, in connection with any case, and this case was then pending.

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Predicated upon that, if Your Honor please, coupled with the lack of counsel, although Mr. Geders voluntarily came there, Judge Krentzman specifically determined that he would require the Government to specifically comply or specifically enforce their agreement that nothing said would be used against John Geders and would not permit that inquiry be made of the Government witnesses, and it was excluded from the record.

Now, Mr. LaSpada having participated in those proceedings in the last trial, unless he has some other theory of law, I submit it falls into the same problem here and he raised the question through his own inquiry and presented it to the Jury in spite of the response by the witness, "I don't know anything about it." The nature and form of the question has now implanted in the Jury's mind, just as if he asked the character witness about convictions that he couldn't prove -- he would be in the same sort of dilemna.

I have no specific performance case -- I had no way of anticipating he would go into an area that he had been previously barred.

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MR. LaSPADA: That is not true, Your Honor.

MR. LEVINE: Therefore, I have to apologize that I don't have it with me at this moment. I can bring it at the time Your Honor calls for us to reconvene. That is the posture of that particular question, that is the posture of those particular proceedings, and that particular inquiry as it was in the last case, and I submit that I would urge obviously for a compatible ruling by Your Honor in this case under the same circumstances.

MR. LaSPADA: First of all, Your Honor, Mr. Geders admitted that on the stand in the last trial. If he is expected to take the stand on this trial --

THE COURT: It was not excluded when the questions were asked?

MR. LaSPADA: May I refer to the transcript, Your Honor, and give you what the verbatim question by me is?

"Mr. Geders, during the year 1972, did you ever carry money to New York for Mr. Pedro Alvarez in relation to his drug operations?"

I didn't bring that out on my question.

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"I didn't bring that out in my questions. I would like to object. It is irrelevant, immaterial and is not cross of anything brought out on direct."

"THE COURT: All right. I sustain the objection. I mean -- I overruled the objection. It is relevant and it is in cross.

All right, go ahead."

"It assumes facts not in evidence by defense counsel."

"THE COURT: I have overruled the objection."

"THE WITNESS: I took money up to somebody at a bank and had it changed into larger bills."

"Where did this occur?"

"New York."

"When?"

"I don't know."

"On how many occasions?"

"Twice."

"This is for Mr. Alvarez?"

"Yes, it is."

MR. LEVINE: Your Honor, I am specifically aware of that and specifically aware of the exclusio

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in the Government's case.

Of course, in this case I would urge and present some law of the impropriety of the questions. They dealt with hearsay and Judge Krentzman specifically excluded it based upon the agreement with Government counsel that it would not be used against him.

THE COURT: The agreement -- the exclusion would have to apply to some agent testifying on the Government's case that the Defendant told him he had done these things -- that couldn't be put in if that was the agreement, but that didn't mean they couldn't ask him about it on cross examination as they did in the last trial, and obviously, if he takes the stand. I called you at the Bench when you were putting on these character witnesses and said:

"What are you putting character witnesses on testifying as to the truthfulness of this man before he ever has taken the stand? It is improper."

YOu said: "I represent to you that he is going to take the stand and we are

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proceeding on the assumption he is going to take the stand."

MR. LEVINE: No question about that.

THE COURT: So it was your fault these people testified out of turn, number one. So, in view of the fact that they testified out of turn but before the Defendant testified, then Government counsel has a right to do as he did.

Now, secondly, you made no objection to that question. I would have sustained the objection forthcoming because, of course, I knew nothing about what was in the record on cross examination in the prior trial, not having heard any testimony in this case on that point, I would have sustained the objection.

I looked at you wondering why you weren't objecting.

MR. LEVINE: How can you object to such an improper question? I am well aware of the fact the witness has no knowledge --

THE COURT: If you can't object to an improper question I certainly heard a lot of objections during the course of this case which have

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been sustained.

MR. LEVINE: Your Honor, I don't view it in that context.

The vice of the problem is in the question, in asking the question and no objection can get the question out of the mind of the Jury whether it is raised or not raised.

THE COURT: But it is obvious that if it can't come in, if the Court can't or doesn't let it in, we would have to deal with it in that fashion, but you caused this problem by putting on these people before you put on the Defendant, because the Rule specifically says that you can't go into the truthfulness of a witness by other testimony unless the witness has first testified.

MR. LEVINE: I am aware of that. If Your Honor please, I did this to accommodate the witnesses. The Government didn't object. If they had objected I would have turned around and put my client on first.

THE COURT: The motion at this point is denied.

MR. LEVINE: All right, sir.

... Thereupon, Court recessed at 11:55 o'clock a.m., and reconvened at 1:35 o'clock p.m.

C.9

MR. LEVINE: Your Honor, I indicated to Mr. LaSpada I plan as my next witness to call Mrs. Geders who is here in the Courtroom as a witness, and he advised me he was desirous of having Your Honor warn her of her Constitutional rights.

I thought since the Jury wasn't in -- the first witness would be rather brief, Your Honor, might want to do it on the record at this time, and then I can call her and proceed. Obviously, whatever procedure Your Honor would follow rather than have the Jury come in and then go out after being here just a few minutes.

THE COURT: All right.

MR. LEVINE: Mrs. Geders, do you want to step over here, please?

Do you want her to be sworn, Your Honor?

THE COURT: All right.

THE CLERK: Do you solemnly swear the testimony you shall give in this cause will be the truth, the whole truth, nothing but the truth, so help you God?

THE WITNESS: I do.

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THE COURT: Do you want one?

THE WITNESS: I don't believe I will need one.

THE COURT: Can you afford to get one if you should want one?

THE WITNESS: I think so.

THE COURT: If you can't afford to have one, the Court will appoint one to represent you at no cost to you. Do you know that?

THE WITNESS: Yes, sir, I do.

THE COURT: All right. Do you still wish to testify?

THE WITNESS: Yes, sir.

THE COURT: All right. Step outside and wait to be called back in here.

(Witness excused.)

THE COURT: Do you have another witness?

MR. LEVINE: I don't have a problem with the other witnesses, if Your Honor please. At the end of the morning I addressed myself to certain aspects of the record and a matter that I sought to bring up with Your Honor.

At this time, if Your Honor please, I move to make a motion -- oral motion in limine to preclude the Government from inquiring of either Mrs. Geders or Mr. Geders

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about the matters on what I said this morning which was not precise -- I would like to correct my statement to the Court, having now had an opportunity to read the transcript as to the precise question that Judge Krentzman ruled on and the proposition of law I had in that regard on the latter issue, namely, the money.

If Your Honor please, on page 1246 of the transcript in the trial during the course of cross examination of Mr. Geders, he was asked whether or not he ever told Mr. Kilgore or Mr. Patrick about placing the title to a vehicle in his name and he denied that he had done that on each instance.

Thereafter, the Government prosecutor Mr. LaSpada, asked him whether or not he had a meeting with Mr. Blasingame in his office in May or June of 1973, with other Federal agents who are identified in the transcript and he answered yes, and then he started to ask:

"Do you recall at that meeting telling a gentleman --" at which point he was interrupted by Mr. Rinehart who was representing

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Mr. Geders, and at that time there was a Bench conference.

During the course of the Bench conference on page 1248, Mr. Blasingame, Assistant United States Attorney, represented to the Court that Mr. Geders was advised that nothing that went on at that meeting that would relate to his case would be used in connection with his case, and accordingly, after some colloquy and argument, Judge Krentzman excluded the question that was designed to impeach him, by virtue of what he had told the Assistant United States Attorney and the prosecutors.

At the conclusion of that sidebar conference -- there was no reference in that sidebar conference at all to money transported up into New York. I was in error when I mentioned that to the Court.

The very next question after the sidebar conference was the question that Mr. LaSpada addressed himself to the Court and read to the Court relating to whether or not Mr. Geders during the year 1972 took some money to New York for Mr. Alvarez, and whether

LILLIAN MELILLO
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
NORTHERN, MIDDLE AND SOUTHERN DISTRICTS OF FLORIDA

he converted the small bills into larger bills. The only objection that was raised at that point was the relevancy and materiality at which point in time, the objection was overruled and the witness was directed to answer the question.

I submit to the Court that the Government at that same conference learned from Mr. Geders of his activities in New York regarding the transfer of bills, and the conversion of small bills into large bills, and as a matter of fact, subsequent to that, an Internal Revenue Service agent who was present at that meeting, as I understand, Mr. Geders made a statement to him about that.

THE COURT: I don't think you need to go any further on this.

What I can see went on at that meeting, the Government cannot bring out at least at this point what he told the people at that meeting, but that doesn't -- if he doesn't take the stand, they can't -- they couldn't bring that out in their case, but if he takes the stand, they can ask him if he went

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to New York. Just because he told them about that doesn't preclude them from asking him about it if he takes the stand.

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I rely on the authority of In Re: Doe, 410 Federal Supplement, 1163, 1976 Eastern District of Michigan opinion, dealing with --

THE COURT: Who wrote it?

MR. LEVINE: Who wrote the opinion? District Judge Joyner.

It is as close as I can find to a case, specifically the import of the opinion is fully supported by the proposition -- if I might very briefly, this is a situation where a Defendant comes in and says -- he is not a Defendant at that time -- goes into the prosecutor's office under some issues not really here, and says:

"I have cocaine and I understand you are going to charge me. I am willing to plead to that offense."

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I think he waived the indictment but says, "I am not willing to tell you or testify as to where I got the cocaine from." The Government says, "Fine. Under those circumstances we will proceed." And they go forward and he pleads, and the man is sentenced, and the Government then seeks to grant the man immunity from prosecution and to compel him to tell them who it was that he got the cocaine from and the opinion of the Court is, beginning with the question of specific performance of agreement -- when the Government makes the agreement, they will not do so, they cannot directly, indirectly or otherwise violate that agreement.

The agreement in this particular situation was that there would be no questions about this case and none of the answers given or used in connection with the prosecution of this case. The Government, I submit, is bound by that agreement -- stuck with it.

THE COURT: Where is the agreement? I would like to see it.

MR. LEVINE: It is only oral, and at this point, only in the record.

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THE COURT: I don't have anything before me in this case -- nothing except your representation. You weren't there, were you?

MR. LEVINE: I certainly was not there. What we have is the record of the statement of the prosecutor as to what the agreement was.

THE COURT: Well, read it.

MR. LEVINE: All right, sir. Of course, that is not even sworn. I would be happy to call my client so that we will have a record here. I would like to do it at this time in connection with my motion in limine.

THE COURT: You had an opportunity to file a motion in limine for two or three years.

MR. LEVINE: I only had the case for about six or seven months, but I had more than ample time to.

THE COURT: We are not going to keep the Jury waiting while you argue some new motion that you just came up with since lunch.

MR. LEVINE: It is only because of the fact that the Government is seeking to do something in part that they were precluded from doing in the last case.

THE COURT: They weren't precluded from doing it.

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MR. LEVINE: An objection was sustained based upon the plea bargain and the violation of Constitutionality rights by Judge Krentzman at the last trial, and I have to assume they will abide by that.

THE COURT: That is a distortion of what actually happened, by the way you have described it, counsel. That is a complete distortion.

MR. LEVINE: I am sorry, Your Honor. I don't understand.

THE COURT: Because what you read to me from the transcript was what the Judge held they couldn't do is to ask a question, whether he told Mr. Blasingame that he excluded -- he didn't exclude asking the Defendant himself, when he took the stand and subjected himself to cross examination -- did he in fact go to New York -- that was in the record, and it wasn't excluded the last time at all.

Bring in the Jury and let's get on with the next witness. I will hear this motion some time later, when it becomes pertinent.

MR. LEVINE: All right, Your Honor.

... Thereupon, the Jury was reseated in the Jury box

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unavailability. You don't have to have an order.

MR. LEVINE: Over in Pinellas County they are difficult if not impossible, but it is the first continuance. It is not a case I previously had to continue, but I am going to resolve it myself.

THE COURT: All right. We will resume at nine o'clock and ten o'clock for the Jury.

... Thereupon, Court recessed at 4:20 o'clock p.m., November 11, 1976, and reconvened at 9:00 o'clock a.m., November 15, 1976.

THE COURT: Now, the purpose of this hearing this morning for an hour prior to the Jury coming in is to give Mr. Levine an opportunity to present his motion in limine concerning the anticipated cross examination by Mr. LaSpada of Mr. Geders. Mr. Levine planned to present this motion the other day, but was out of time -- the Jury was waiting, and since it pertained only to the cross examination of the Defendant, I thought we would wait and have it at this time.

You may present the motion and also anything in support of it both in the way of

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argument and evidence.

I also note that Mrs. Geders is present in the Courtroom and the Rule has been invoked. How is that she is present?

MR. LEVINE: Judge, I don't plan on using her any more.

THE COURT: You heard me state that a person who is under the Rule is not to come into the Courtroom before or after they testify until the case is completely over.

MR. LEVINE: Your Honor, I am sorry. I didn't hear that aspect of it. I am familiar with the reason for the Rule is that the witness doesn't come in so that they cannot therefore testify again based on what they heard. I had no intention of recalling her.

THE COURT: The other side might call her.

MR. LEVINE: I am terribly sorry, Your Honor.

THE COURT: Of course, if both of you want to stipulate, she may remain.

MR. LaSPADA: No, YOur Honor. I requested that the other day of Mr. Levine. She was in the Courtroom on Mr. Geder's direct on Friday and I strongly object to her being in this Courtroom.

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APPELLANT-D(1)

THE COURT: Do you want one?

THE WITNESS: I don't believe I will need one.

THE COURT: Can you afford to get one if you should want one?

THE WITNESS: I think so.

THE COURT: If you can't afford to have one, the Court will appoint one to represent you at no cost to you. Do you know that?

THE WITNESS: Yes, sir, I do.

THE COURT: All right. Do you still wish to testify?

THE WITNESS: Yes, sir.

THE COURT: All right. Step outside and wait to be called back in here.

(Witness excused.)

THE COURT: Do you have another witness?

MR. LEVINE: I don't have a problem with the other witnesses, if Your Honor please. At the end of the morning I addressed myself to certain aspects of the record and a matter that I sought to bring up with Your Honor.

At this time, if Your Honor please, I move to make a motion -- oral motion in limine to preclude the Government from inquiring of either Mrs. Geders or Mr. Geders

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about the matters on what I said this morning which was not precise -- I would like to correct my statement to the Court, having now had an opportunity to read the transcript as to the precise question that Judge Krentzman ruled on and the proposition of law I had in that regard on the latter issue, namely, the money.

If Your Honor please, on page 1246 of the transcript in the trial during the course of cross examination of Mr. Geders, he was asked whether or not he ever told Mr. Kilgore or Mr. Patrick about placing the title to a vehicle in his name and he denied that he had done that on each instance.

Thereafter, the Government prosecutor Mr. LaSpada, asked him whether or not he had a meeting with Mr. Blasingame in his office in May or June of 1973, with other Federal agents who are identified in the transcript and he answered yes, and then he started to ask:

"Do you recall at that meeting telling a gentleman --" at which point he was interrupted by Mr. Rinehart who was representing

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Mr. Geders, and at that time there was a Bench conference.

During the course of the Bench conference on page 1248, Mr. Blasingame, Assistaht United States Attorney, represented to the Court that Mr. Geders was advised that nothing that went on at that meeting that would relate to his case would be used in connection with his case, and accordingly, after some colloquy and argument, Judge Krentzman excluded the question that was designed to impeach him, by virtue of what he had told the Assistant United States Attorney and the prosecutors.

At the conclusion of that sidebar conference -- there was no reference in that sidebar conference at all to money transported up into New York. I was in error when I mentioned that to the Court.

The very next question after the sidebar conference was the question that Mr. LaSpada addressed himself to the Court and read to the Court relating to whether or not Mr. Geders during the year 1972 took some money to New York for Mr. Alvarez, and whether

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he converted the small bills into larger bills. The only objection that was raised at that point was the relevancy and materiality at which point in time, the objection was overruled and the witness was directed to answer the question.

I submit to the Court that the Government at that same conference learned from Mr. Geders of his activities in New York regarding the transfer of bills, and the conversion of small bills into large bills, and as a matter of fact, subsequent to that, an Internal Revenue Service agent who was present at that meeting, as I understand, Mr. Geders made a statement to him about that.

THE COURT: I don't think you need to go any further on this.

What I can see went on at that meeting, the Government cannot bring out at least at this point what he told the people at that meeting, but that doesn't -- if he doesn't take the stand, they can't -- they couldn't bring that out in their case, but if he takes the stand, they can ask him if he went

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to New York. Just because he told them about that doesn't preclude them from asking him about it if he takes the stand.

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MR. LEVINE: I certainly was not there. What we have is the record of the statement of the prosecutor as to what the agreement was.

THE COURT: Well, read it.

MR. LEVINE: All right, sir. Of course, that is not even sworn. I would be happy to call my client so that we will have a record here. I would like to do it at this time in connection with my motion in limine.

THE COURT: You had an opportunity to file a motion in limine for two or three years.

MR. LEVINE: I only had the case for about six or seven months, but I had more than ample time to.

THE COURT: We are not going to keep the Jury waiting while you argue some new motion that you just came up with since lunch.

MR. LEVINE: It is only because of the fact that the Government is seeking to do something in part that they were precluded from doing in the last case.

THE COURT: They weren't precluded from doing it.

THE COURT: Mr. Blasingame is still a U.S. Attorney?

MR. LaSPADA: No, he is not, Your Honor.

THE COURT: Where is he?

MR. LaSPADA: In private practice.

THE COURT: Is he here?

MR. LaSPADA: He is outside the Courtroom.

THE COURT: Mr. Hudson -- who is he?

MR. LaSPADA: He is an agent with the Alcohol, Tobacco, and Firearms Agency.

THE COURT: Well, I think you are going too far. Let's just confine it -- let me ask you now, Mr. Geders, did you discuss your case -- this accusation against you at all?

THE WITNESS: No, Your Honor.

THE COURT: You didn't ask them if they would drop the charges?

THE WITNESS: That is what Mr. Miller was talking about for the exchange of information.

THE COURT: You say he was talking about -- tell me exactly what was said and where it was said.

THE WITNESS: This would have been in his office before the meeting and he was telling me that he couldn't promise me anything but that he could pretty well get it from the Judge --

he would make a suggestion to the Judge and he never had a Judge turn him down on any recommendation.

THE COURT: Recommendation for what?

THE WITNESS: To let me out of my charges.

THE COURT: The Judge was going to decide this?

THE WITNESS: Mr. Miller said he couldn't make me any promises himself, all he could say is that it would be a good chance as far as relocation and then finding me a job -- that he couldn't promise me directly, only the Judge could promise me that, but he would recommend it to the Judge.

THE COURT: Recommend what?

THE WITNESS: To let me off out of my charges in return for my testimony.

THE COURT: The Judge was going to decide to let you off?

THE WITNESS: That is what he said, that the Judge would have to decide, but he would make the recommendation and he never had a Judge turn him down.

THE COURT: Were you going to plead guilty?

THE WITNESS: Pardon?

THE COURT: Were you going to plead guilty then?

Q You didn't say to Mr. Blasingame, "If I cooperate will you drop the charges?"

A I just discussed that with Mr. Miller.

Q Your answer is no, you didn't mention it to Mr. Blasingame, is that correct?

A No.

THE COURT: You never told your attorney that you worked out a deal and that you were going to get off and the charges were going to be dropped?

THE WITNESS: I never knew for sure that the charges would be dropped, but the first time my attorney found out about this meeting was this trial when he brought up the question of the Porsche.

THE COURT: Did your attorney buy things at the Sound Room?

THE WITNESS: Did my attorney buy things? Do you mean like equipment?

THE COURT: Yes.

THE WITNESS: No, Your Honor.

THE COURT: But he was a friend of Mr. Alvarez?

THE WITNESS: I don't know if he was a friend or not. I don't know if he ever met Pedro Alvarez. All I know, he represented Pedro

THE COURT: All right.

THE CLERK: You are already under oath.

LOWELL MILLER

having been previously produced and administered the oath, resumed the witness stand and testified further as follows, in absence of the Jury.

DIRECT EXAMINATION

BY MR. LaSPADA:

Q Mr. Miller, I remind you you are still under oath from your prior testimony.

A Yes, sir.

Q Mr. Miller, directing your attention to the Spring and early Summer of 1973, did you have occasion to have a conversation with Mr. Geders about a meeting?

A Yes, sir.

Q To the best of your recollection, where did this conversation take place?

A The best I can recall, I believe Mr. Geders called me at first on the telephone.

Q To the best of your recollection, what did he tell you at that time?

A He indicated at that time that he wanted to tell us some things particularly about Pedro Alvarez and his activities.

A I don't have any recollection of it, no, sir.

Q You have no memorandum whatsoever of any of the conversations that you had with Mr. Geders either in Blasingame's office or by yourself or subsequent thereto, do you?

A No, sir.

Q You therefore have absolutely nothing to refresh your recollection from?

A Nothing that I can think of, no, sir.

Q You testified about this subject matter before in the trial before Judge Krentzman, and you would have the benefit of the transcript to testify from?

A I don't believe I testified about this subject.

Q Do you have a policy in practice where you talk to cooperating individuals as opposed to informants, namely, one who had been charged and is going to cooperate as opposed to an informant to give you information about something that is going to happen? Do you have a policy to make promises to them for whatever cooperation they give you that it would be made known to the U.S. Attorney's Office and to the probation office and to the Judge -- don't you tell them that?

A What I usually tell them, I don't know particularly what the policy is, anybody talks about cooperating,

you and he and not with the prosecutor present?

A I am sure -- I don't know the exact words.

Q That is what you tell a cooperating witness so that you can get his continued cooperation, right?

A I tell him what I can do which is make no promises other than we will sit down and talk about it with the U.S. Attorney and it will be basically his decision.

Q But you let the cooperating witness know that that cooperation would more than likely have some effect on his ultimate sentence, wouldn't you tell him that?

A Not necessarily. I mean, we may get into a discussion if he asks about it because they usually will ask about it.

Q And that is the reason why they come in?

A I can say, "Look, I don't know --"

Q Don't you indicate to them in the instances in the past, when you have had a cooperating witness, that cooperating witness has wound up better than someone who hasn't cooperated, and is ultimately sentenced?

A I might indicate the various possibilities to the Defendant.

Q Because of the difference between cooperation and non-cooperation?

A Right.

Q Now, did you have any discussion along those lines directly or indirectly at any point in time with Mr. Geders either before you met with Mr. Blasingame or at the meeting with Mr. Blasingame?

A You are talking about did I tell him if he cooperated what would happen?

Q Either tell him directly or suggest to him or infer to him, tell him his cooperation would be made known to somebody? What, if anything, did you say to him?

A The only thing I might have told him, just like I previously testified -- I couldn't make any promises. The main meeting was held right up here in Mr. Blasingame's office and he was the one that was doing most of the talking at that time.

Q Well, what was your understanding of the reason for Mr. Geders cooperating about Alvarez -- why was he doing it?

A My understanding at that time were two reasons. He wanted to help himself in this case and he was also -- he had some kind of falling out with Mr. Alvarez and he was interested in getting Mr. Alvarez.

Q He let you know he wanted to help himself in this case and in turn you were either silent or told him that his cooperation would be made known to appropriate officials, so it could conceivably help him

APPENDIX - E

MR. LEVINE: Your Honor, I am going to call Mr. Geders on behalf of the motion.

THE COURT: You are under the same oath that was administered to you earlier when you testified on direct examination; that is, to tell the truth, the whole truth, and nothing but the truth.

JOHN A. GEDERS

having previously been produced and administered the oath, resumed the witness stand and testified further as follows, in absence of the Jury.

DIRECT EXAMINATION

BY MR. LEVINE:

Q You are the Defendant, John Geders?

A Yes.

Q Mr. Geders, did you have occasion to have a meeting in the U.S. Attorney's office with Oscar Blasingame, Lowell Miller and certain representatives of the United States Government?

A Yes, I did.

Q And could you tell me whether or not that meeting came before or after you were indicted in this cause?

A It was after I was indicted.

Q Will you tell the Court how it was that meeting

came about?

A When I turned myself in here at the Post Office --

Q Excuse me. After you learned of the indictment?

A I found there was an indictment against me and I turned myself in. Lowell Miller told me he wanted to see me in his office in about a week without any attorney.

Q In accordance with that discussion you had with Mr. Miller, did you make some arrangements for that meeting or appointment?

A I met with him a couple of times. I believe it was the second time that we ended up in the U.S. Attorney's office.

Q Okay. Did you go on any of the meetings with Mr. Miller with your attorney?

A No.

Q Were you represented by counsel at that time?

A I was represented, yes.

Q Could you tell me, sir, particularly as it relates to the meeting in the U.S. Attorney's office in the presence of Mr. Miller whether there was any preliminary discussion as to whether those matters to be discussed would in any way relate to the pending charge?

A I was told by Mr. Miller before the meeting and I

believe by Mr. Blasingame at the meeting that anything I said would not be used against me.

Q Were you advised of any of your rights at the meeting as you recall other than that advice?

A That was the only advice I got.

Q Was there a discussion between yourself and Mr. Blasingame about some individual that you had information on that was dealing in heroin?

A Yes, I originally was the one who supplied that information. I talked to Mr. Miller and he ran a computer check on the guy and it was just before we went into the meeting I believe.

Q And why was it that you were going to provide that information to him? Did you discuss that with him as to what the situation was going to be?

A I thought it might help me out on my case.

Q During the course of the discussion with Mr. Blasingame at the U.S. Attorney's office, was there any inquiry made of you regarding Pedro Alvarez?

A Yes, sir, there was.

Q What response or responses did you give to those inquiries?

A One of the questions was about the title of the car -- the Porsche which I explained to him. There was a Charles Hudson who asked about Pedro's activities,

and I told him what I knew about that. They asked about the Sound Room.

Q During the course of your discussion at the U.S. Attorney's office wherein the discussion addressed itself to any monies that you may have taken to New York for Mr. Alvarez and exchanged small bills or large bills -- that subject matter?

A Yes, that came up.

Q Would you tell us as best you recall who made the inquiry and what response you gave?

A I don't remember exactly how it came up, but I told them what happened.

Q And what was it you told them in that respect?

A That I would carry some money for Pedro to be changed

Q Could you tell us when it was that particular transaction as a matter of fact took place in relation to November 26, 1972?

A It was twice in December of 1972, once before Christmas and once after.

Q Did anybody present inquire of you as to the point in time when you did that for Mr. Alvarez?

A I don't believe that came up.

Q Ead you in any discussion that you had with Mr. Miller before this meeting at the U.S. Attorney's office ever discuss with him the title to the vehicle

or the exchange of money for Mr. Alvarez?

A No.

MR. LEVINE: You may inquire.

CROSS EXAMINATION

BY MR. LaSPADA:

Q Mr. Geders, would you explain again how this meeting came about?

A Yes. Lowell Miller told me --

Q Who was present and where did the conversation occur and when?

A It would have been probably about two days after the indictment came out when I learned of it, I came with my attorney and turned myself in.

Q Where did you turn yourself in?

A Here at the Post Office and I was fingerprinted. They took my picture and put me in a little holding cell for awhile and then Lowell Miller came in with another agent -- I don't remember who it was -- I don't think they identified themselves. Lowell Miller identified himself and they took me over into one of the other back rooms there and told me that it wasn't me that he wanted -- he wanted Pedro Alvarez and would like to speak to me in about a week in his office and told me not to bring my attorney.

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or the exchange of money for Mr. Alvarez?

A No.

MR. LEVINE: You may inquire.

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Q When you came to the Post Office and turned yourself in, were you at that time arrested?

A When I turned myself in I assume you would call it an arrest.

Q Your attorney was with you at that time, was he not?

A Yes, he was.

Q Who was your attorney?

A Ralph W. Rinehart.

Q Were you fingerprinted at that time?

A Yes, sir, that's right.

Q Were you taken before the Magistrate?

A Yes.

Q Was a bond posted at that time?

A Yes.

Q Were you actually put in the holding cell?

A You are put in the holding cell before you are taken before the Magistrate for your bond.

Q When did the conversation take place, before or after you were taken before the Magistrate?

A I believe it was before.

Q Where was your attorney at this time?

A Outside somewhere -- he wouldn't put him in the holding cell.

Q They brought you into the holding cell and was there anyone else in the holding cell with you?

A I remember David Butler being there for a little while and then he got out. He was getting out just as I was getting in.

Q Do you remember who the Marshal was -- who was there at the time?

A I sure don't.

Q After you were put in the holding cell you say Lowell Miller came into the holding cell area?

A Not in the holding cell -- I was taken to another room. There was a main room there at the Post Office where they take your picture and then there are two more rooms, one is the holding cell and one is a door with no door on it.

Q Can you get to that room from the holding cell?

A No.

Q You have to walk outside?

A That is what I said.

Q You walked outside from the holding cell?

A Yes.

Q Where did you go then?

A To the small room.

Q Did you walk outside into the hall through another door?

A No.

Q Did the Marshals at that time tell you where you

were going?

A No.

Q They just took you in there with Mr. Miller?

A They didn't take me -- they let me out -- one guy there let me out at Mr. Miller's request, then I was taken back, Mr. Miller and myself.

Q Did Mr. Miller come into the holding cell and say "I would like to talk to you."?

A No.

Q How do you know it was Mr. Miller's request?

A He said something to the Marshal.

Q Mr. Miller came into the holding cell while you were there?

A No, he didn't. There was a main room there and the holding cell is off the main room.

Q He came to the area adjacent to the holding cell, is that correct?

A Right.

Q And you observed Mr. Miller at that time?

A Yes.

Q You knew who Mr. Miller was at that time?

A No, I told you he introduced himself.

Q What did you overhear him say at that time?

A He said something -- I heard my name and something about letting me out.

Q Mr. Miller asked the Marshal to let you out and the Marshal just opened the cell and let you walk out with Mr. Miller?

A That's right.

Q And he took you into another room?

A Right.

Q Who was in that room?

A Just Lowell Miller and myself.

Q What did Mr. Miller say to you at that time?

A He said -- he introduced himself, showed me his identification and said that they really weren't after me -- they wanted Pedro Alvarez.

Q Where was your attorney at this time?

A Outside in the hall somewhere.

Q Did you ask to see your attorney at that time?

A No.

Q And what happened then?

A He said he wanted information on Pedro and talked about helping me out on my case and then said to get with him in his office in about a week.

Q Did he set up a time when you were supposed to come or were you to call at a later date?

A He said to call in about a week.

Q That is all that was discussed at that time?

A That's right.

Q And did you tell the receptionist who you were there to see?

A I don't believe there was a receptionist there at the time. I didn't see one.

Q Did you see Mr. Miller as soon as you walked in?

A I saw him -- he was talking to somebody else at the time.

Q What happened then?

A He told me to go to his office and wait for him, that he would be right in.

Q And you went in with Mr. Miller?

A I went in and Mr. Miller came in shortly afterwards.

Q Was anyone else present?

A Not in his office.

Q Was anyone present during the conversation?

A Not in the office, no.

Q What was said at that time?

A Basically, he wanted me to supply information on Pedro and I told him I wasn't sure about supplying that, but that I could help him on the Carlin case where a particular guy was responsible for a couple of deaths.

Q Who was that individual?

A William Bern. I gave his name to Mr. Miller and told him what I knew about him, and he ran the name

through the computer and pulled a printout on it.

Q Did you say anything at that time about Alvarez?

A No.

Q And what happened next?

A Well, he said, "Let's go up to the U.S. Attorney's office and talk to them about this." So, we went on up there.

Q Who was present during that meeting?

A There were at least half a dozen people, maybe eight. I know Mr. Blasingame was there, Mr. Miller was there, Charles Hudson was there, Gene Hill was there, and I don't remember who any of the others were.

Q And which office were you taken into?

A They told me it was the U.S. Attorney's office.

Q Was this the first time you had been there?

A Yes, it is.

Q After you arrived there you and Mr. Miller arrived together, is that right?

A That's correct.

Q And after you arrived there you met Mr. Blasingame, Mr. Hudson, Mr. Miller, Mr. Hill and other individuals?

A That's right.

Q Did this meeting take place in a large office or a

APPENDIX H

THE COURT: Mr. Blasingame is still a U.S. Attorney?

MR. LaSPADA: No, he is not, Your Honor.

THE COURT: Where is he?

MR. LaSPADA: In private practice.

THE COURT: Is he here?

MR. LaSPADA: He is outside the Courtroom.

THE COURT: Mr. Hudson -- who is he?

MR. LaSPADA: He is an agent with the Alcohol, Tobacco, and Firearms Agency.

THE COURT: Well, I think you are going too far. Let's just confine it -- let me ask you now, Mr. Geders, did you discuss your case -- this accusation against you at all?

THE WITNESS: No, Your Honor.

THE COURT: You didn't ask them if they would drop the charges?

THE WITNESS: That is what Mr. Miller was talking about for the exchange of information.

THE COURT: You say he was talking about -- tell me exactly what was said and where it was said.

THE WITNESS: This would have been in his office before the meeting and he was telling me that he couldn't promise me anything but that he could pretty well get it from the Judge --

he would make a suggestion to the Judge and he never had a Judge turn him down on any recommendation.

THE COURT: Recommendation for what?

THE WITNESS: To let me out of my charges.

THE COURT: The Judge was going to decide this?

THE WITNESS: Mr. Miller said he couldn't make me any promises himself, all he could say is that it would be a good chance as far as relocation and then finding me a job -- that he couldn't promise me directly, only the Judge could promise me that, but he would recommend it to the Judge.

THE COURT: Recommend what?

THE WITNESS: To let me off out of my charges in return for my testimony.

THE COURT: The Judge was going to decide to let you off?

THE WITNESS: That is what he said, that the Judge would have to decide, but he would make the recommendation and he never had a Judge turn him down.

THE COURT: Were you going to plead guilty?

THE WITNESS: Pardon?

THE COURT: Were you going to plead guilty then?

THE WITNESS: He mentioned something about pleading and I said I didn't want to because I felt I was innocent of the charges in my case. I would work out and cooperate, but not by pleading guilty.

THE COURT: You were going to trial?

THE WITNESS: Right.

THE COURT: You were going to go to trial, but he was going to get the Judge to let you off?

THE WITNESS: He was going to talk to the Judge about it.

THE COURT: About what?

THE WITNESS: About dropping the charges. I told him that I wouldn't plead guilty, that they would have to drop the charges altogether, and he said he would have to talk to the Judge, and that he couldn't promise me that himself.

THE COURT: All right.

BY MR. LaSPADA:

Q Did you mention this fact to Mr. Blasingame when you were in the office with him?

A What Mr. Miller said to me?

Q Yes.

A No, I thought it was arranged.

APPENDIX I

A No.

Q And you never mentioned it to your attorney?

A No.

Q Is everything you testified to today at this hearing the truth?

A Yes, sir, it is.

MR. LaSPADA: No further questions.

MR. LEVINE: I have none, unless the Court has some further inquiry.

THE COURT: No, you may step down Mr. Geders.

(Witness excused.)

THE COURT: All right. Anything further, Mr. Levine?

MR. LEVINE: No, sir.

MR. LaSPADA: The Government would call Mr. Blasingam

THE CLERK: Do you solemnly swear the testimony you shall give in this cause will be the truth, the whole truth, nothing but the truth, so help you God?

THE WITNESS: I do.

THE CLERK: Sir, would you state your full name for the Court, please?

THE WITNESS: Oscar Blasingame, B-L-A-S-I-N-G-A-M-E.

OSCAR BLASINGAME

having been produced and first administered the above oath, testified in absence of the Jury as

follows:

DIRECT EXAMINATION

BY MR. LaSPADA:

Q What do you do for a living?

A I am a lawyer, sir.

Q How long have you been an attorney?

MR. LEVINE: If Your Honor please, I will stipulate to some of the preliminary.

MR. LaSPADA: I would like to bring it out, Your Honor. I think it is important as to his credibility.

THE COURT: Very well. Let's proceed on.

THE WITNESS: Seven years and three days.

BY MR. LaSPADA:

Q Where do you practice right now, Mr. Blasingame?

A St. Petersburg, Florida.

Q What firm are you with?

A Harrison, Greene, Mann, Rowe, Stanton and Master[illegible]

Q How long have you been with that firm?

A since December 23, 1973.

Q Prior to that time, where did you work?

A I was Assistant United States Attorney, the Middle District of Florida.

Q How long did you hold that position?

A Almost four years.

Q Directing your attention to October of 1973, Mr. Blasingame, did you participate in the trial of John Geders?

A Yes.

Q And Michael Fink?

A Yes, sir.

Q Prior to that time, prior to the beginning of the trial sometime in the Spring of 1973, did you have occasion at that time to indict certain individuals with regard to a smuggle from Colombia, South America?

MR. LEVINE: He can't indict anybody, Your Honor.

BY MR. LaSPADA:

Q Did you bring the case to the Grand Jury -- were you the attorney who handled the smuggle case from South America involving John Geders and others?

A For some reason I think I didn't bring the indictment -- I think I inherited the case. I may have brought the indictment -- I would have to see the file.

Q At some point in time, you became the attorney handling that case, is that correct?

A Yes, sir.

Q Do you recall meeting with John Geders in your office some time in May or June of 1973 after the

it, and perhaps other activities of Mr. Alvarez.

BY MR. LaSPADA:

Q Did you discuss at that time with Mr. Miller the fact that Mr. Geders was represented by an attorney?

A More or less -- these discussions were just in passing, talking about this case or other cases, and I know we were sort of concerned with the fact that he was under an indictment in this case -- Geders was.

Q Did Mr. Miller mention the fact Mr. Geders called him and he asked him to come into the office?

MR. LEVINE: If Your Honor please, it is leading and suggestive.

THE COURT: This is not before the Jury so I will overrule it.

THE WITNESS: Mr. Miller said that he had contact with Geders and that Geders said he would like to come in.

BY MR. LaSPADA:

Q Okay. Did there come a time when Mr. Geders appeared in your office?

A Yes, sir.

Q And who was present at that time?

A I know it was Mr. Geders, myself, Special Agent

it, and perhaps other activities of Mr. Alvarez.

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A Yes, sir.

Q And who was present at that time?

A I know it was Mr. Geders, myself, Special Agent

Charles Hudson of the Alcohol, Tobacco, and Firearms, Mr. Miller and Agent Gene Hill of the Internal Revenue Intelligence, and I believe there were one or two other people -- I am not sure.

Q Now, were the individuals other than Mr. Miller -- were you present prior to the time that Mr. Geders arrived?

A It was my office, yes.

Q In other words, did Mr. Geders arrive before or after these other individuals arrived?

A I don't recall, Mr. LaSpada.

Q What occurred after Mr. Geders came into your office?

A All of us gathered in the office and we closed the door and I was introduced to Mr. Geders. I believe it was the first time I ever met him. We sort of introduced everybody around and began discussing the purpose of the meeting.

Q Now, will you state with particularity to the best of your recollection, what you said at that time? Were you the first one to begin the conversation, Mr. Blasingame?

A As I recollect, yes, sir, I was sort of master of ceremonies.

Q You were the attorney in charge of the case at

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A As I recollect, yes, sir, I was sort of master of ceremonies.

Q You were the attorney in charge of the case at

that time, is that correct?

A In charge of this case, yes, sir.

Q Will you tell the Court what you recall saying to Mr. Geders at that time?

A I advised Mr. Geders of his so-called Miranda rights and we discussed the possibility -- we discussed the purpose, that was to talk about Pedro Alvarez and the fact that this case existed, and that we could not discuss anything whatsoever to do with this particular case, and we discussed the fact that Mr. Geders was there voluntarily. He said he was, and that in fact requested the meeting, and we discussed the problem in regard to Mr. Geders having an attorney in this case. I believe at that time it was Mr. Rinehart, and I said, "Do you want an attorney in this case?" More than just the usual Miranda routine, and he said, "No." And the problem was -- Mr. Geders advised me that Mr. Rinehart in fact represented Mr. Alvarez and we discussed, I believe, some other attorneys whose names I don't recall, all of whom Mr. Geders might have gone to, but they all were involved with Mr. Alvarez.

It boiled down to the fact that none of the attorneys Mr. Geders was dealing with at that time or normally dealt with could know of this meeting

because they would meet immediately and pass it on to Pedro Alvarez.

Then we went ahead with the discussion and advised Mr. Geders that we were just there to find out more or less what he had to say about Pedro Alvarez -- what sort of information he could furnish us. We made no promises. This was just a preliminary meeting to find out what sort of things he could offer and what sort of investigation would go from there.

THE COURT: Well now, you say you gave the Miranda warning. Would you tell us exactly what you said?

THE WITNESS: I don't recall exactly, but I had the general warning used -- "You have a right to remain silent and anything you say can and will be used against you in a Court of law. You have a right to an attorney if you want one and if you cannot afford an attorney, one will be appointed for you.

If at any time you wish to stop after you commence the interview -- if at any time you wish to cease the interview, please tell us and we will stop, and you can either stop completely or get an attorney if you wish one.

THE COURT: Well now, you told him that?

THE WITNESS: Yes, sir, that was not the real essence of the discussion -- we went much further than you would in just reading over the card or something, because of the peculiarity of the situation.

THE COURT: Was there any discussion about this case that is now pending, about there being a plea or there being any leniency or dropping of the charges or anything in connection with it in return for his talking with you?

THE WITNESS: No, sir. No discussion other than we wouldn't discuss anything whatsoever to do with this case at all.

THE COURT: Why would you think that Mr. Geders would come and talk to you?

THE WITNESS: Because of the amount of involvement he had with Pedro Alvarez and all the other activities.

THE COURT: What would be the purpose if you weren't going to show him any kind of consideration for his talking to you -- what was in it for him to talk to you about it?

THE WITNESS: He would be subject to all kinds of indictments and prosecutions in the matters

relating to Mr. Alvarez which were totally unrelated to this, Your Honor.

THE COURT: Well, but was there some discussion then or impliedly or directly that there would be other charges dropped or not prosecuted or not brought?

THE WITNESS: Not to my recollection.

THE COURT: What did you think as you sat there and talked to Mr. Geders that he was thinking he would get for in a sense, to use a colloquial expression -- spilling the beans?

THE WITNESS: I thought he would be helping in this Alvarez matter so as to not get indicted or tied up in any indictments of Pedro Alvarez.

THE COURT: Well, did you represent to him that he was going to not be indicted then if he told you about Alvarez?

THE WITNESS: No, sir.

MR. LEVINE: Judge, could we ask the reverse on that?

I don't mean to interrupt the Court.

THE COURT: I will let you ask that.

MR. LEVINE: All right. Thank you, Your Honor.

THE COURT: Well, did you make any representation to him that the information that he gave to

you would not be used in this case in the prosecution of this case?

THE WITNESS: No, sir. No, Your Honor.

THE COURT: Did anybody in your presence make such a representation?

THE WITNESS: No, Your Honor. We didn't want to talk about this case in any way whatsoever.

THE COURT: Why?

THE WITNESS: Because he was represented by an attorney in this case and it had nothing whatsoever to do with Pedro Alvarez -- it was a completely different venture.

THE COURT: Then you weren't planning then to use the information that you secured from him in that conversation in this case?

THE WITNESS: No, Your Honor, we had no idea that we would get into this Pedro Alvarez business in the trial.

THE COURT: Did you try Mr. Geders the last time or did Mr. LaSpada?

THE WITNESS: Both -- Mr. LaSpada and I.

THE COURT: Why did you try to get it in the last time?

THE WITNESS: As I recall --

THE COURT: Why did you try to get in this information

that you got from him in this conference in the trial of this case?

THE WITNESS: As I recall, Your Honor, this is only as I recall -- Mr. Geders brought up the subject for some reason of Pedro Alvarez on the stand or it came out perhaps in the testimony of Mr. Kilgore, and Mr. Geders took the stand and was raising this image of Mr. Clean, that he had been entrapped into this particular venture for which he was charged, and denied anything to do with marijuana, as I recall, and it came to the point where he was in fact saying one thing on the stand, contrary totally to what he had advised us in the meeting in my office, and we couldn't sit there and let him tell what we in fact felt very strongly were lies on the stand in order to support a defense of entrapment, so it came out in cross examination as I recall, sir.

THE COURT: I see. All right.

BY MR. LaSPADA:

Q Mr. Blasingame, who made the first approach to this meeting; was it Mr. Geders or was it the Government to your knowledge?

saw an opportunity for some reason to get at Mr. Alvarez. There was also the fact that we were closing in, we thought, at that time on Mr. Alvarez and Mr. Geders knew the day of reckoning was coming. This case compared to his involvement with Mr. Alvarez was minimum, or this was very small compared to the massive amount of activity involving Mr. Alvarez which included gun running, load after load of marijuana and that sort of thing.

BY MR. LaSPADA:

Q Did Mr. Geders at that meeting admit his involvement with Mr. Alvarez during the period in question?

A Yes, sir.

Q As far as the narcotics and other hard drugs, do you recall?

A As far as marijuana, yes, sir.

MR. LaSPADA: I have no further questions, Your Honor.

CROSS EXAMINATION

BY MR. LEVINE:

Q Mr. Blasingame, did you advise Mr. Geders and agree with him there would be no discussion pertaining to the pending case?

A Yes, sir.

Q Did you advise Mr. Geders on that occasion you wanted to speak to him about Pedro Alvarez who was then under investigation by possibly ten Federal, State and local agencies?

A That would be the essence of it, yes, sir.

Q Have you read the transcript in the first Geders trial when you made those statements?

A I glanced at it this morning. Mr. LaSpada read it to me I believe, Friday morning quickly.

Q Now, recognizing Mr. Geders had counsel in the criminal proceedings, did you obtain a written waiver of him of counsel?

A Not to my recollection, no, sir.

Q Do you know whether or not anybody had prior to the time you all met?

A I don't think so, no, sir.

Q Now, did you at that time directly or indirectly advise Mr. Geders that any cooperation he would give in connection with Alvarez or others would be made known to the Judge who was handling his case?

A I don't recall it, no, sir.

Q That would be the usual practice in your office for cooperation, if not dismissal at least advise the Judge of the extent of the cooperation, the

or any other time provided any information to the Government about Pedro Alvarez and others importing marijuana into the United States?

A Specifically as to that, I don't think so. I don't recall, Mr. Levine.

Q In connection with the first Geders case you did not produce to Mr. Rinehart incident to the pretrial discovery, any statement, admissions or otherwise that Mr. Geders made to you in this meeting, is that correct, sir?

A I think that is correct, yes, Mr. Levine.

Q And the reason for that is you represented -- what was the reason for that that you did not produce any admissions or statements that he made to you in this meeting, could you tell us that?

A It did not relate, we thought, in any way to this case whatsoever, and Mr. Geders didn't want Mr. Rinehart or anyone who had any contact with Mr. Alvarez knowing about this because his life would be on the line if he did.

Q Well, did you specifically avoid production because of the fact that you avoided talking to Mr. Geders about the pending case?

A I don't know why I specifically avoided it.

Q Let me ask you to look at page 1250 of the Geders

transcript and tell me whether or not that refreshes your recollection.

A Yes, sir.

Q That would be the correct answer?

A Apparently that was, if I said it then, I would not have lied to the Court then, so I assume that was the reason.

THE COURT: The answer was what?

MR. LEVINE: The answer was that you specifically avoided producing any matters to Mr. Rinehart relating to this meeting between yourself and Mr. Geders because at the time you met with him, you in your mind avoided talking about this case whatsoever, correct?

THE WITNESS: That is what I said then, and that would certainly be one reason, and another reason in a usual situation, if we had an attorney representing a client and the client had talked about matters unrelated to the particular trial, I would probably have gone ahead and mentioned to the attorney just quite frankly, "Your man told us about such and such also, in addition to this." But in this particular case, I didn't dare to produce it to MR. Rinehart, I thought because

that Mr. Rinehart ever represented Mr. Alvarez in any criminal matter in any community throughout the United States or elsewhere?

A My source for the information that Mr. Rinehart had represented in some way Mr. Alvarez, was Mr. Geders. I don't know -- I don't recall whether the representation was actually in criminal charges or what. Mr. Geders told us, "I can't tell Mr. Rinehart about this because he also has or does represent Alvarez." And there was some other attorneys -- I don't recall who were mentioned also that he couldn't go to because of that reason.

Q Just lastly, if I may, did you advise the Court in connection with the first Geders trial that Mr. Geders specifically was not going to discuss this case with you when you met with him?

A Did I advise the Court of that?

Q Yes, sir.

A I don't recall. I assume I did. Could you show me the transcript as to whatever I said then?

Q Page 1252, the first paragraph on the top of the page.

A Yes, sir, I said to the Court here, "We have no Constitutional question because the man specifically was not going to discuss this case at the time."

A I don't have any recollection of it, no, sir.

Q You have no memorandum whatsoever of any of the conversations that you had with Mr. Geders either in Blasingame's office or by yourself or subsequent thereto, do you?

A No, sir.

Q You therefore have absolutely nothing to refresh your recollection from?

A Nothing that I can think of, no, sir.

Q You testified about this subject matter before in the trial before Judge Krentzman, and you would have the benefit of the transcript to testify from?

A I don't believe I testified about this subject.

Q Do you have a policy in practice where you talk to cooperating individuals as opposed to informants, namely, one who had been charged and is going to cooperate as opposed to an informant to give you information about something that is going to happen? Do you have a policy to make promises to them for whatever cooperation they give you that it would be made known to the U.S. Attorney's Office and to the probation office and to the Judge -- don't you tell them that?

A What I usually tell them, I don't know particularly what the policy is, anybody talks about cooperatin

I can't make any promises, whatever is done will be brought to the attention of the U.S. Attorney's Office.

Q Don't you go on and tell them it will be made known to the Judge for purposes of consideration of the sentencing?

A That is up to the United States Attorney's Office. I make it known to the United States Attorney's Office.

Q You don't tell them that the Judge will ultimately know about the cooperation through the U.S. Attorney's Office?

A Not necessarily, no.

Q Did you tell that to Mr. Kilgore when you met with him after this incident?

MR. LaSPADA: Objection, Your Honor. It is not the issue here.

THE COURT: Overruled.

THE WITNESS: Did I tell what to Mr. Kilgore?

BY MR. LEVINE:

Q Just a minute. Did you have occasion at some point in time, to meet with Mr. Kilgore and discuss with him whether or not his cooperation would be made known to the sentencing Judge either through the U.S. Attorney's Office or through the probation

you and he and not with the prosecutor present?

A I am sure -- I don't know the exact words.

Q That is what you tell a cooperating witness so that you can get his continued cooperation, right?

A I tell him what I can do which is make no promises other than we will sit down and talk about it with the U.S. Attorney and it will be basically his decision.

Q But you let the cooperating witness know that that cooperation would more than likely have some effect on his ultimate sentence, wouldn't you tell him that

A Not necessarily. I mean, we may get into a discussion if he asks about it because they usually will ask about it.

Q And that is the reason why they come in?

A I can say, "Look, I don't know --"

Q Don't you indicate to them in the instances in the past, when you have had a cooperating witness, that cooperating witness has wound up better than someone who hasn't cooperated, and is ultimately sentenced?

A I might indicate the various possibilities to the Defendant.

Q Because of the difference between cooperation and non-cooperation?

A Right.

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A I might indicate the various possibilities to the Defendant.

Q Because of the difference between cooperation and non-cooperation?

A Right.

Q Now, did you have any discussion along those lines directly or indirectly at any point in time with Mr. Geders either before you met with Mr. Blasingame or at the meeting with Mr. Blasingame?

A You are talking about did I tell him if he cooperated what would happen?

Q Either tell him directly or suggest to him or infer to him, tell him his cooperation would be made known to somebody? What, if anything, did you say to him?

A The only thing I might have told him, just like I previously testified -- I couldn't make any promises. The main meeting was held right up here in Mr. Blasingame's office and he was the one that was doing most of the talking at that time.

Q Well, what was your understanding of the reason for Mr. Geders cooperating about Alvarez -- why was he doing it?

A My understanding at that time were two reasons. He wanted to help himself in this case and he was also -- he had some kind of falling out with Mr. Alvarez and he was interested in getting Mr. Alvarez.

Q He let you know he wanted to help himself in this case and in turn you were either silent or told him that his cooperation would be made known to appropriate officials, so it could conceivably help him

in this case?

A We had very little conversation prior to coming to Mr. Blasingame's office.

Q How about answering my question?

A I don't recall.

Q When he said he wanted to help himself in this case, what did you tell him?

"We won't help you -- we can't help you."

Did you remain silent?

A I can't recall what I told him.

MR. LEVINE: No other questions, Your Honor.

THE COURT: All right. Anything further?

MR. LaSPADA: No, Your Honor.

THE COURT: All right. You may step down.

(Witness excused.)

THE COURT: Anything further?

MR. LaSPADA: No, Your Honor.

THE COURT: Anything further?

MR. LEVINE: No, sir.

If Your Honor please, I would preliminarily rely on the authority I previously cited to the Court in the matter of John Doe, 410 Federal Supplement 1163, a 1976 case, and the concept contained therein.

They make a bargain and they are stuck

Kilgore then attempted to -- I am sorry. He was called afterward, I am sure, but whether that inquiry was made of him at all, so what we are dealing with here now is nothing more than impeachment. My client conceivably could be impeached by virtue of the fact according to the Government's information he confided in Kilgore and told Kilgore something.

THE COURT: I think I will permit the Government to ask Mr. Geders if he took money to New York for Mr. Alvarez, and if he denies he ever did, he can ask then if he told Mr. Blasingame and others that he did and he may also ask him, did he tell Mr. Kilgore in November or prior to November 26th that he had previously taken money to New York.

MR. LEVINE: But Judge, as it relates to the very first inquiry, is the Government going to be limited or restricted to the time frame of the indictment as to predisposition? The question of whether or not he ever talked about taking money to New York for Mr. Alvarez, I submit should be limited to prior to November 26th, 1972.

THE COURT: I agree, but since there is a conflict in the testimony --

MR. LEVINE: The only conflict arises between Kilgore and Geders as to the time.

THE COURT: Except that previously -- if he stated that on the stand, I think Mr. LaSpada has to ask when, if he admits he did it, and then state when it was, and then of course Mr. LaSpada has got the transcript here where he previously stated that he didn't know when it was. He also has Mr. Kilgore to testify that it was previously. It is a matter the Jury will have to determine, and if they determine that it was after November 26th, they shouldn't consider it. If they determine it was before November 26th, they then may consider it on the issue of predisposition.

MR. LEVINE: Would Your Honor instruct the Jury in that respect that the time the inquiry is raised of my client?

MR. LaSPADA: I don't think that is necessary, Your Honor.

THE COURT: I think it would be more appropriate after we have heard all the evidence on it for me to instruct them in the final charge.

MR. LEVINE: Well, Your Honor, if I may -- you know it is at this point that the issue is being raised and the manner, and I recognize you have on a limited basis heretofore instructed them as to a particular area.

THE COURT: I will give them a limiting instruction on that at the time it first comes in and then again in the final instructions.

MR. LEVINE: Thank you, Your Honor.

THE COURT: So the motion in limine for the reasons stated, is denied and we will proceed on. We will take a ten minute recess.

... Thereupon, Court recessed at 10:55 o'clock a.m. and reconvened at 11:10 o'clock a.m.

THE COURT: We are ready to proceed. Bring in the Jury.

... Thereupon, the Jury was reseated in the Jury box at 11:10 o'clock a.m.

THE COURT: Good morning, members of the Jury. I am sorry you had to wait this past hour, but some times in Jury trials matters arise both in the case that is being tried as well as other matters that the Court must attend to. Sometimes they take longer than anticipated and I try to avoid it as much as possible

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isn't that correct?

MR. LEVINE: That is my recollection, Your Honor.

THE COURT: Of the Defendant as a witness.

MR. LEVINE: Of the Defendant as a witness, yes, sir.

THE COURT: Now, what you are saying is, you expect that certain testimony to be elicited from this witness may be contrary to that brought out on cross examination of the Defendant.

MR. LEVINE: Yes, sir, and I see that Mr. Blasingame is here and Mr. Hudson previously identified him as being at the meeting, and I anticipate they are going into the meeting. There were several grounds stated for the objection, then ultimately Your Honor admitted for cross examination purposes, for the limited purpose of impeachment and I don't know what other theory they would be offering it at this point in time. I made the legal argument and we had that out of the presence of the Jury. I just want to stand on that unless something new or something else came up.

THE COURT: What area are you going into, Mr. LaSpada?

MR. LaSPADA: Your Honor, I am going to inquire of this witness about the meeting, what was discussed with regard to the automobile and what

was discussed with regard to carrying the money and I feel this not only deals with, but should be considered by the Jury not only with the credibility of the Defendant, but also with regard to the issue of predisposition and entrapment.

MR. LEVINE: While Your Honor is considering that, may we be advised either from the Government or a response by the witness whether or not he is going to be in a position to date the money transaction?

THE COURT: Yes, I think that is important. You may ask the witness.

BY MR. LaSPADA:

Q Do you recall, Mr. Hudson, during the time that you had this discussion concerning the carrying of money to New York when Mr. Geders indicated that this took place?

A Yes, I recall what he indicated.

Q What did he say at that time?

A On one occasion was in the Spring of '72, relative to smuggling incident in April -- I believe it was, of '72, shortly thereafter in the Spring of '72.

MR. LEVINE: I certainly would trust, unless my client said, "Right after the smuggling

incident", that the witness is going to relate the date.

MR. LaSPADA: He is going to relate what the client said.

THE COURT: That should be stated -- what he said and not what this witness's conclusion was in connection with it. He can only testify as to what the Defendant allegedly said.

All right. Bring in the Jury.

... Thereupon, the Jury was reseated in the Jury box at 11:00 o'clock a.m.

THE COURT: All right. All the Jurors are present, counsel and the Defendant.

You may continue.

BY MR. LaSPADA:

Q Mr. Hudson, directing your attention to the Spring of 1973, around May of 1973, did you have occasion to be present during a conversation with the Defendant John Geders?

A Yes, I did.

Q Where did this conversation take place?

A In this building on the fourth floor in the offices of the United States Attorney.

Q Who was present at that time?

MR. LEVINE: If Your Honor please, I object to it as

being irrelevant and immaterial on the grounds previously stated. I don't know whether or not Your Honor gave me the standing objection.

THE COURT: Very well. Your objection is overruled.

MR. LEVINE: Thank you, Your Honor.

THE WITNESS: Those present besides Mr. Geders and myself, Oscar Blasingame, then an Assistant United States Attorney, Mr. Lowell Miller, drug enforcement agent and for part of the meeting, there was a special agent from the Internal Revenue Service, the Intelligence Division, Gene Hill.

BY MR. LaSPADA:

Q Do you recall whether or not this was prior or after the indictment in this case?

A I believe it was in the latter part of May of '73. I believe that would have been after -- I am not sure, but I'm sure the meeting was in May of '73.

Q And what occurred after Mr. Geders arrived?

A Well, Mr. Blasingame had the first conversation with Mr. Geders and I believe advised him of his rights. There was some discussion about the fact that he had an attorney, and he wasn't present, and it was discussed whether or not that met with Mr. Geders approval, and he stated that he preferred at that

point that his attorney not be present and gave a reason.

Q What reason did he give?

MR. LEVINE: I object. It is irrelevant and immaterial, Your Honor.

THE COURT: Sustained.

BY MR. LaSPADA:

Q During this conversation, was anything discussed concerning title to a Porsche automobile?

A Yes, there was.

Q What did Mr. Geders say with regard to that?

A That Mr. Alvarez had asked him, that is, Mr. Geders, to title the Porsche automobile in Mr. Geders' name so as to preclude the detection by the Internal Revenue Service for liability by Mr. Alvarez.

Q Was any discussion had at that time concerning Mr. Geders carrying money to New York?

A Yes, there was.

Q What did Mr. Geders say at that time concerning that?

MR. LEVINE: If Your Honor please, we object on the grounds previously stated and argued out of the presence of the Jury.

THE COURT: Overruled.

THE WITNESS: I believe two occasions in 1972 he had

carried money to New York City to a bank there. I don't recall he gave the name of the bank, and rather large sums of money in small denominations which were converted to larger bills.

BY MR. LaSPADA:

Q Did he say when and why he carried the money there?

A The when was that one occasion was in April, I believe, or shortly after April of 1972. I don't recall the date of the other transaction. The specific why of converting the money was just to make it more conceivable -- I believe was his explanation, rather than have a large amount of small bills to have a small amount of large bills.

Q Did he indicate at that time where the money came from in the April trip or May trip?

A Yes, he did.

Q What did he say at that time?

A It was proceeds from Mr. Alvarez' smuggling operation.

MR. LaSPADA: NO further questions, Your Honor.

THE COURT: Now, members of the Jury, the testimony of this witness concerning alleged statements of the Defendant concerning the titleing of the Porsche automobile is not to be considered by you in your deliberations as to whether

the Defendant did any of the acts charged in any count under consideration. It may be considered by you only as it may bear on the credibility of the Defendant as a witness.

The testimony of this witness Hudson concerning alleged statements of the Defendant about carrying money to New York City is to be considered by you not in any respect as to whether the Defendant did any of the acts charged in any count of the indictment, but may be considered by you only as it may bear on the credibility of the Defendant as a witness, and as it may bear on the issue of entrapment.

You may proceed.

CROSS EXAMINATION

BY MR. LEVINE:

Q The attorney referred to in that meeting was Ralp Rinehart, right?

A Mr. Blasingame was there -- the attorney representing Mr. Geders at that time, I believe was Mr. Rinehart.

Q Now, Mr. Hudson, did you make any memorandum or any record or any report of this meeting in May of 1973?

A No, sir.

Honor.

THE COURT: Well then, he hasn't been sworn in the presence of the Jury.

We will start over again.

THE CLERK: Do you solemnly swear the testimony you shall give in this cause will be the truth, the whole truth, nothing but the truth, so help you God?

THE WITNESS: I do.

THE COURT: Start over.

OSCAR BLASINGAME

having been produced and first administered the oath, testified as follows:

DIRECT EXAMINATION

BY MR. LaSPADA:

Q Sir, would you state your full name, please?

A Oscar Blasingame.

Q What do you do for a living?

A I am a lawyer, sir.

Q How long have you been an attorney?

A Seven years and four days.

Q And who are you associated with?

A The firm of Harrison, Greene, Mann, Rowe, Stanton and Master, in St. Petersburg.

Q How long have you been associated with them?

A Three years.

Q Prior to that time were you an Assistant United States Attorney?

A Yes, sir.

Q In Tampa, Florida?

A That's correct.

Q And your office was on the fourth floor of this building?

A Yes, sir.

Q How long were you an Assistant United States Attorney?

A Four years.

Q Directing your attention to the Spring of 1973 -- May of 1973, were you involved in the case involving John Geders and others with regard to a smuggle from South America?

A Yes, sir.

Q During that period of time did you have occasion to have a conversation with the Defendant, John Geders?

A Yes, I did.

Q Where did that conversation take place?

A It took place in my office on the fourth floor of this building.

Q And who was present during this conversation, to your best recollection?

A Myself, Mr. Geders, Special Agent Charles Hudson, Alcohol, Tobacco and Firearms, Agent Gene Hill of the Internal Revenue Service, Mr. Miller and perhaps one or two other agents.

Q Could you tell the ladies and gentlemen of the Jury what precipitated that meeting at that time?

MR. LEVINE: I object to that as too vague and indefinite.

THE COURT: Sustained.

BY MR. LaSPADA:

Q After Mr. Geders arrived, what, if anything, did you say to him at the beginning of the meeting?

A I introduced myself, I believe. Mr. Miller introduced me to Mr. Geders whom I had never met, and then I believe we introduced the agents all around and I advised Mr. Geders of the so-called Miranda rights -- that he had the right to remain silent, and anything he said could and would be held against him in a Court of law. He had a right to an attorney and if he could not afford an attorny, an attorney would be appointed for him, and that if he decided to proceed with the interview, he could stop it at any time and obtain an attorney or just cease the interview permanently, and then I advised him that as I understood it, he was here at his own request

which had been related to me through Agent Miller and that he was here voluntarily and that he could leave at any time if he wished.

He was here to discuss matters concerning one Pedro Alvarez, and that it would have nothing whatsoever to do with the present indictment he was under, which was this particular case.

Q This was after the indictment in this case, is that correct?

A It was after Mr. Geders had been indicted in this case and then I asked him if he wanted an attorney, and Mr. Geders said no. We discussed his being there since he was under indictment, and since I was prosecuting him, naturally there was some concern about him being there, and that is why we reached a mutual agreement that nothing whatsoever about this case would be discussed at all, and then Mr. Geders said he would prefer not to have an attorney because --

MR. LEVINE: If Your Honor please, I object to that. It is irrelevant and immaterial to the issue.

THE COURT: Sustained.

THE WITNESS: Anyway, we agreed to go ahead with the interview concerning matters involving

Pedro Alvarez.

BY MR. LaSPADA:

Q Do you see John Geders in the Courtroom today?

A Yes.

Q Would you --

MR. LEVINE: We stipulate as to the Defendant's identification, Your Honor.

THE COURT: Very well.

BY MR. LaSPADA:

Q Mr. Blasingame, was anything discussed at that time concerning a Porsche automobile, title to a Porsche automobile?

A Yes, sir.

Q What did Mr. Geders say at that time concerning the title to the Porsche automobile?

A Mr. Geders advised us that Pedro Alvarez had purchased a new Porsche, I believe it came out it was purchased out of Atlanta -- somewhere like that anyway, and the Porsche was put into Mr. Geders' name rather than Mr. Alvarez' name, and the money to purchase it came from Mr. Alvarez' marijuana operations, and he had to conceal this very expensive automobile from the Internal Revenue Service, so it was put into Geders' name even though it was Mr. Alvarez' car.

Q What, if anything, was discussed about carrying large sums of money to New York?

A Mr. Geders advised us that some time a year or two before the meeting, that Mr. Alvarez had given Mr. Geders a large amount of cash in small bills and Mr. Geders took it to New York City to a bank that someone had told Mr. Geders to take it to that bank up there, and he was to meet a banker where it would be dry cleaned, or in this case, the small bills would be converted to large bills.

Q What was done with the money?

A Mr. Geders took it to New York and this was money from Mr. Alvarez' marijuana operations. It was taken to New York by Mr. Geders and dry cleaned.

Q Then what was done after the money was converted to large bills?

A It was returned to Mr. Alvarez.

Q Mr. Blasingame, do you know Randy Kilgore?

A Yes, sir.

Q And how did you come to know Randy Kilgore?

MR. LEVINE: If Your Honor please, I object to that as not rebuttal of anything we brought out.

MR. LaSPADA: It certainly is, Your Honor.

THE COURT: How he came to know him? No, I am going to sustain that objection to that question.

BY MR. LaSPADA:

Q Now, Mr. Blasingame, you were the attorney involved in this case, is that correct?

A Yes, sir.

Q You were the attorney who presented the case to the Grand Jury whose name appears on the indictment, is that correct?

A Yes, sir.

Q During the period of time which you were involved in this case, did you ever receive any information regarding whether or not Randy Kilgore was a Government informant in this case?

A Did I ever receive any information?

Q That he was a Government informant.

A He was never a Government informant, or I never would have indicted him or presented it to the Grand Jury to be indicted if he had been a Government informant in this case.

Q Thank you. You don't indict Government informants, do you Mr. Blasingame?

A No, sir, you can't if they are working on a case because they couldn't have committed a crime, because i would not have had the intent to commit the crime.

MR. LaSPADA: Thank you. No further questions, Your Honor.

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at the time, that I was a little disgusted of Pedro Alvarez for taking the car and wrecking it before the title was switched over. I was mad because it was a bad mark on my insurance, and that is all I remember telling anybody about that car.

Q Do you recall a meeting in May or June of 1973 in Mr. Blasingame's office?

A Yes.

Q Do you recall telling Mr. Blasingame, Mr. Miller, Mr. Chuck Hudson that you allowed this car to be put in your name for the benefit of Pedro Alvarez so that no one including the IRS would know Alvarez had that much money to afford a car like that?

A I was asked about the car -- I never told them anything of the sort.

Q You deny making that statement?

A I deny saying it to anybody -- that is not how it happened. I never made a statement like that to anybody at any time.

Q Mr. Geders, during the year 1972, did you ever carry money to New York -- large sums of money to New York on behalf of Pedro Alvarez relating to his drug operation?

MR. LEVINE: To which we object, Your Honor. It is irrelevant and immaterial unless it is prior to November 26, 1972, it wouldn't be probative of any

issue.

THE COURT: Overruled.

BY MR. LaSPADA:

Q Did you?

A Did I at any time?

Q Yes.

A I carried some money, whether it was related to drugs or anything, I don't know where the money came from, but I did in December of 1972.

Q You are sure it was December of 1972?

A I am positive.

MR. LEVINE: Excuse me. If Your Honor please, in light of the answer of the witness, I move to strike the question and the answer and ask the Jury be instructed to disregard it. It is irrelevant and immaterial to these proceedings and not germane to any issue.

THE COURT: Well, such testimony concerning taking any money to New York could be considered by the Jury only for the limited purpose and that would be, members of the Jury, as it might bear if you found that it did on the issue of predisposition concerning the issue of entrapment.

I will define for you in greater detail these terms in my final instructions, but I tell you now

that any such testimony could only be considered by you on that point and it could be considered by you only if you find from the evidence that any such trip to New York occurred prior to November 26, 1972.

If the Government fails to prove that such a trip occurred prior to November, 1972, then you should not consider the evidence for any purpose.

Very well.

MR. LaSPADA: Prior to November 26, Your Honor, is that correct?

THE COURT: That's correct, prior to November 26, 1972.

BY MR. LaSPADA:

Q You say Mr. Geders, you don't know if this was related to his drug operation?

A I didn't ask him.

Q Did you assume it was?

A I didn't assume anything.

Q Where did this occur?

A What, the money change?

Q Yes.

A New York.

Q When?

A In December of 1972.

Q Do you recall in October, 1973, the question being asked:

"QUESTION: When?"

And the answer, "I don't know."

A I may have said that I didn't know at the time; I didn't, but since then I thought about it and I remember one trip was before Christmas and one was right after Christmas. The trip I took there before Christmas I purchased my wife a pair of earrings and my daughter, two hand puppets.

Q And this testimony was given in October, 1973, almost over three years ago, is that correct?

A That's right. That doesn't mean I can't remember it now, Mr. LaSpada. At the time I didn't know -- I wasn't sure.

Q This was for Mr. Alvarez, is that correct?

A That's correct.

Q What was the purpose of your trip?

A I took smaller bills and had them changed into one hundred dollar bills.

Q What did you do with the bills after you received them?

A I took them back down to Pedro.

Q And you gave them to Pedro Alvarez?

A Yes, I did.

Q How much was involved?

A Somewhere around a hundred thousand dollars -- I am just guessing because I never counted it myself.

Q About one hundred thousand dollars?

A Under one hundred -- maybe sixty or seventy -- somewhere in that area. I am just guessing. I saw the money but

never counted it myself.

Q Do you remember me asking you this question in October, 1973:

"QUESTION: How much money was involved?

ANSWER: About one hundred thousand dollars."

A About one hundred thousand dollars -- right. I didn't say one hundred thousand dollars.

Q Do you recall ever telling Mr. Hudson at this meeting in Mr. Blasingame's office about when this trip occurred?

A I never told him when it occurred, no, I don't believe so.

Q Mr. Geders, did you conspire to import marijuana into this country from Colombia, South America?

A When?

Q During the period September, 1972 until November 26, 1972?

A In November I agreed to go along with it. I did not conspire to any of the plans before then but I did admit I did agree to go along with it towards the end of November, yes, I did.

Q You joined the conspiracy to smuggle in over one thousand pounds of marijuana into this country from Colombia, South America?

A That's right.

Q Did you on November 26, 1972, import into this country approximately nine hundred seventy-seven pounds of marijuana for the purpose of distributing it?

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it except the man fueling it.

We were standing around -- Mahoney and myself were standing next to the plane and Dave went off. Shortly after Dave left, this man came up to me and said, "You all have marijuana on that plane?" I said, "Of course not." Which was obviously a lie as you could see it stacked up against the windows. I couldn't think of anything better to say.

"I know you have it and they know you have it, and right now they are radioing on ahead and they will bust you as soon as you enter the United States. The best thing you can do when you take off the island is ditch it out."

We got to that point and David Butler started walking back and the guy saw him and started running off real fast.

Dave Butler said, "What did he say?" I told Dave and he said that he was trying to get paid off. "It happens to me every time I come through here."

Q He didn't say anything to Dave Butler -- he just took off, is that correct?

A As soon as he saw Dave Butler he took off.

Q Do you remember giving this testimony in October, 1973:

"QUESTION: All right. Then what happened?

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ANSWER: I mentioned this to Dave -- I said, "Are we going to land here today? I think it is against the law." He said, "I got them paid off. Everything is okay." When we touched down -- at this time there were more than fifty people as opposed to two previously.

David wandered off with a man to a room and one of the Colombians came up and said, "You all have marijuana on that plane?" I said, "Of course not." He said, "I know you have it and they know you have it, and right now they are radioing up ahead to bust you. YOu better ditch it."

About the time he finished saying that, Dave came back and the man looked at Dave and said, "Are you the pilot?" And Dave said, "Yes." The man took off and we didn't see him any more."

Do you remember giving that answer?

A I believe so. May I read it?

Q Okay. Let me ask if you gave this answer also.

"QUESTION: A native came up to you?

ANSWER: That's correct.

QUESTION: How long were you on the ground before the native came up to you?

ANSWER: Not more than five minutes. They hadn't even started refueling the plane.

QUESTION: He just volunteered this information?

ANSWER: He volunterred it. He was looking around when he did it and when he saw Dave he started to go back and asked Dave if he was the pilot, and Dave said yes and the guy went on and we didn't see him again."

Do you remember giving those answers?

A Yes.

Q Okay. What happened next?

A We took off. Shortly after we were in the air, Jim and I started to discuss what happened and what to do about it, and we decided at that point that we should ditch it all out and call it quits.

Q What happened then?

A We approached Dave Butler on it and Dave Butler said no, that there was no way that he could do it. He wasn't working for us, he was working for Randy Kilgore and had an obligation to get the marijuana to Randy, and that is what he was going to do.

Q He told you he was working for Randy Kilgore at that time?

A Yes, and he had an obligation to bring it in for Randy.

Q That is what he told you?

A The best of my recollection, yes.

Q Did you give these answers in October, 1973, to these questions -- page 1138:

"QUESTION: All right. What specifically did you ask or tell Dave?

ANSWER: I asked him to slow down and drop the flaps and the gear to slow the plane down so that we could get rid of it.

QUESTION: What did he say?

ANSWER: He told us we were crazy, just paranoid, and there wasn't anything wrong."

Do you remember giving that answer to that question?

A I believe so. Could I see it, please?

I remember that coming up too. He told us we didn't know what we were doing.

Q Do you remember giving this answer to this question:

"QUESTION: You wanted to call it all off -- you made the suggestion to Mr. Butler?

ANSWER: Jim and I did.

QUESTION: And Mr. Butler didn't want to do that?

ANSWER: Mr. Butler said we were paranoid and there wasn't a thing going wrong. He just kept going and we asked him to slow the plane down, and

he just said, 'You are paranoid.'

QUESTION: Is that all that was said about that?

ANSWER: That is all that was said at that point."

Do you remember giving those answers to those questions?

A May I see them?

Q Certainly.

A I remember, and if you will go farther down you will see there was another instance that it came up.

Q In this testimony did you ever mention that Mr. Butler said that he was working for Mr. Kilgore?

A In that testimony, no. I don't recall reading it in that one, but it did occur.

Q This testimony was almost three years ago -- over three years ago, is that correct?

A I believe so.

MR. LaSPADA: Your Honor, do you want to take a recess?

THE COURT: Yes.

Members of the Jury, we will recess for fifteen minutes. Step to the Jury room and follow the instructions I have previously given to you

... Thereupon, Court recessed at 3:00 o'clock p.m., and reconvened at 3:20 o'clock p.m.

THE COURT: How much longer do you expect to be, Mr. LaSpada?

MR. LaSPADA: I anticipate ten or fifteen more minutes, Your Honor.

THE COURT: Do you have any redirect?

MR. LEVINE: Not at this point I do not. I would have three short witnesses.

THE COURT: Are you going to take the rest of the afternoon?

MR. LEVINE: It would be rather short -- Kilgore may take a couple of moments and the other witnesses should be rather brief. One of them is Detective Jackson who was up all last night, and I told him not to get here until two and he has only had a couple of hours of sleep, so I would like to get to him tonight.

THE COURT: Now, Mr. LaSpada, if he rests then in the space of an hour, that would be four thirty. Are you going to have any rebuttal?

MR. LaSPADA: Yes, Your Honor.

THE COURT: How long is your rebuttal going to be?

MR. LaSPADA: I anticipate three or four witnesses,

Judge.

THE COURT: Well, that could take thirty minutes and it could take three days.

MR. LaSPADA: I would anticipate, Judge, if he finishes by four thirty, I would take probably the remainder of the afternoon, and then part of the morning tomorrow morning. I think I could finish by the noon recess.

THE COURT: About that much time for three or four witnesses

MR. LaSPADA: Things have happened where we have gotten started late and I am trying to give the latest. I would anticipate early morning.

THE COURT: All right. Bring in the Jury, please.

... Thereupon, the Jury was reseated in the Jury box at 3:25 o'clock p.m.

THE COURT: All the Jurors are present, counsel and the Defendant. You may continue.

BY MR. LaSPADA:

Q Mr. Geders, how many times during that trip from Inagua back to Lehigh Acres did you request Mr. Butler to slow the plane down so you could unload the marijuana?

A At least twice.

Q During this trip back I believe you mentioned something about seeing a plane -- a Navy plane of some sort, is that correct?

A We did see a plane, yes.

Q Where did that occur?

A That occurred about twenty to thirty miles off the coast of Florida.

Q What happened then?

A Okay. We had just broken through the clouds and saw the lights in Miami, Ft. Lauderdale and up ahead, and ever since the Inagua incident where we were told we were going to get busted, I had my eye out for aircraft to get intercepted, also David said he knew how to get through radar when he came in at that point, he was at a very high altitude, definitely on radar, so those things meant there would be a good chance to get intercepted. It was about twenty or thirty miles off the coast. I looked back and off to the right and behind the tail of the plane was a large twin engine Navy interceptor, I believe.

Q First of all, let me ask you was it dark out?

A It sure was, yes.

Q About ten o'clock at night, is that correct?

A Maybe nine.

Q How far off the tail of your plane was this other plane approximately?

A Approximately twenty-five to fifty feet behind and to the side.

Q Twenty-five feet to fifty feet behind and to the side --

is that approximately from where I am to you?

A Possibly that close.

Q This was a large plane, is that correct?

A Very large plane.

Q You were able to see it from where you were, is that correct?

A Yes I was -- I was able to see the light reflecting over the edges and the faint red glow from the cockpit lights on the windshield.

Q This wasn't a commercial plane?

A No.

Q You are sure of that?

A Positive.

Q What happened then?

A Well, I told Jim that we had been intercepted and Jim turns around and looks and he sees the plane and Dave sees the activity going on so he starts to look too, but in the left front seat he couldn't see out the back window, and I found out later from Jim as I learned it that this particular instance, Dave Butler had picked up the microphone, put it next to his mouth where I couldn't see him, being behind him when he said, "What plane? I don't see the plane." And right after that it pulled over and disappeared.

Q You say you didn't see him pick up the microphone, is that

correct?

A Jim told me about it.

Q Did you hear him say, "What plane?"

A Jim told me about this -- I was in back of him.

Q How did you know the lights went off after Mr. Butler said what he said, if you didn't hear him say it?

A Jim was looking at the plane too and that is about the time it disappeared.

Q It was noisy in that plane, was it not?

A Yes, it was pretty noisy.

Q In order to communicate with one another, you had to get up next to them and talk into their ear or to shout, is that correct?

A Dave was shouting.

Q Dave was shouting?

A What plane -- I could hear him from the back seat. "What plane?" I didn't know the key was in the mike at the time.

Q You heard him say "What plane?"

A I heard him say something -- I could hear him, but Jim was sitting right next to him.

Q What did Jim say before Butler said that?

A What did Jim say?

Q Yes.

A When he saw the plane?

Q Yes.

A He said, "Oh my God. We have been intercepted."

Q He turned and looked at the plane, is that correct?

A Jim was sitting right in front of me over to the right side of the plane where this other plane was -- I could see it from my window. If you were next to the window you could see it, but if you were in the lefthand side of the plane you couldn't see it -- you had to move to the right window to see it. It was in my sight and Jim Mahoney's sight, but Dave couldn't see it, being in the left seat.

Q When Jim turned around to look at the plane, he looked out the window?

A Yes.

Q Is that when he said, "Oh my God. We are being intercepted."

A Something of the sort.

Q Something like that?

A Butler was aware something was going on but he didn't know what it was.

Q How do you know that?

A Because he was doing this trying to see back at what we were looking at before we told him anything, and then Jim turned around and told him we had been intercepted.

Q Now, Mr. Mahoney told Mr. Butler, "We have been intercepted".

A I believe so. I didn't tell him.

Q You just said a few moments ago Mr. Mahoney told you, "Oh

my God. We have been intercepted" as he looked out the window, is that correct?

A That is what I said, yes.

Q Then he turned around and shouted to Mr. Butler?

A I think he told Butler.

Q Then Butler pulls up the microphone and says, "What plane?" And then the lights go off?

A The lights were never on. The plane disappeared and Jim told me afterwards it happened shortly after he picked up the microphone and repeated it.

Q This was a large Navy plane, is that correct?

A Similar to a B-25.

Q It was about twenty-five to fifty feet off your tail over to the right?

A Over to the right.

Q What happened next, did you land the plane?

A Not on the water.

Q You continued to go right on?

A Yes, we did. We tried to get Dave to drop the marijuana at that point again, and that was the second point.

Q You finally arrived at Lehigh Acres?

A That's correct.

Q What happened after you arrived but before you landed?

A We got to Lehigh Acres. We got in the general area, Dave lined up the road with two radio towers up ahead. We could

see the two red blinking lights but we couldn't see the field. There were scattered showers that night and I believe they were cutting off the moon and there was hardly any reflection off the ground at all. We couldn't see a thing. We saw headlights in the distance and cars driving around. We knew we were in the general area so we started to circle and we heard somebody trying to reach us on the walkie talkie that David Butler had, but it was broken up and we couldn't hear what was being said. We found out later they were telling us not to land, that there was something wrong. We couldn't hear them, and about the third pass we started to go over to another airport. The headlights came on on the two cars and camper down on the road. We took that as a signal to come in and land, so we did.

Q What happened after you landed?

A At that point we were supposed to unload the marijuana, refuel the plane and Dave Butler was supposed to leave by himself and take the plane back to Atlanta. We were supposed to get off with the marijuana. Jim and I decided because of what happened along the way -- we couldn't get out before that point, we got to the point where we got out. Dave and I fueled the plane. They checked the oil and they loaded the camper. They left before we were through. We got through fueling the plane and Dave Butler

flew to Fort Myers Airport where he finished fueling up the plane, took us to Tampa and we got out there.

Q Still directing your attention to Lehigh Acres, after you unloaded the plane did you tell Mr. Kilgore that everything went smoothly?

A No, I didn't. There was much talking and I believe I mentioned we had problems. I think it was obvious, the fact that Jim and I weren't getting in the vehicles, but getting on the plane and leaving.

Q Did you help unload the marijuana?

A Jim and I fueled the plane and everybody else loaded the marijuana. There was only one door to the camper and you can't get that many people through it at once.

Q Do you remember being asked this question in October, 1973, and giving this answer -- page 1144:

"QUESTION: You all helped unload and who helped with gassing the plane?

ANSWER: Everybody helped unload. There were four tanks on the aircraft and four cans. Four people helped do that after the pot was unloaded."

A If you will give me that transcript, I will show you the oart that I had -- something that you should read.

THE COURT: Mr. LaSpada and Mr. Levine, I call your attention to 306.13(A). Let's move along.

The question was whether the answer was

given to just that question.

THE WITNESS: Somewhere farther along in the transcript --

THE COURT: That wasn't the question.

THE WITNESS: Yes, I answered that question, but farther along the transcript I clarified that.

THE COURT: Did you hear what I just said? Wait until your counsel asks you questions concerning it, if he wishes to do so.

BY MR. LaSPADA:

Q You did give that answer at that time, did you not?

A Yes, but later on I clarified it. Everybody helped in the operation of the plane. Mr. LaSpada, there is one camper with one door and there is no way five people can get in and out putting pot into it. There was only one door on the plane.

Q After the marijuana was unloaded, you say they took off -- Mr. Kilgore, Mr. Waddington, Mr. Patrick and Mr. Fink, is that correct?

A Yes.

Q Do you mean they left you?

A Yes.

Q And were they headed back to Tampa?

A I really don't know where they were headed all the time. Right as they left, David Butler looked back and said, "What are they going that way for?" I said, "I have no

idea." He said, "They are not supposed to go that way. They were supposed to go down the dirt road." I told him I had no idea why they changed.

Q Did Mr. Butler have any marijuana on that plane?

A He had fifty pounds of his own.

Q You still got back on the plane with the marijuana, is that correct?

A I got back on the plane to get away from the other stuff.

Q You say then that you went to Fort Myers and landed again?

A That's right.

Q Why did you need to land if you just loaded the plane with gas?

A Twenty gallons won't get you more than a half hour's worth of fuel. We had about an hour's trip. The idea behind the fueling -- we would be so close we would have enough to get to Lehigh and not enough to get to another airport after that.

Q You were advised of that fact, is that correct?

A That's right.

Q During these meetings where the conspiracy was discussed, is that correct?

A I believe it would have been Saturday when they said "Get the gas cans." That was the reason.

Q So you went to Fort Myers and then you went back to Tampa, is that correct?

A That's correct.

Q After you arrived in Tampa, what happened then?

A I called my wife and she came and picked me up.

Q What time of the evening or early morning was this?

A I think it was before midnight -- probably would have been around, say, eleven o'clock.

Q Then you went back to your house, is that correct?

A That's correct.

Q And did you then go to bed?

A I was too nervous to go to bed.

Q Did there come a time when you received a telephone call?

A Yes, I received a couple of phone calls.

Q You received two phone calls, is that correct?

A I remember two phone calls.

Q From Mr. Fink?

A I remember one from Mr. Fink and one from Mr. Patrick.

Q Mr. Patrick called you from where?

A He said he was in jail and that Dave Butler was the one who got him there.

Q And after Patrick called, did Mr. Fink call?

A What did you say -- did Mr. Fink call?

Q Did Mr. Fink call after Mr. Patrick telephoned you?

A Yes.

Q What did Mr. Fink tell you at that time?

A He told me to get in touch with his father.

Q What else did he say?

A That was about it -- to gethold of his father and he would tell me what I needed to do.

Q He told you to get hold of his father?

A Right.

Q What were you to tell his father?

A I wasn't supposed to tell his father anything. I was supposed to get some information from his father.

Q What type of information were you supposed to find out?

A I didn't know until I got hoid of his father.

Q How were you to get hold of his father?

A Call him up.

Q After that, what?

A I told you -- he told me to call his father and he would have some information for me.

Q And you received the message from Fred Fink?

A Right.

Q What did Fred Fink tell you?

A He told me Mike was down at the hotel and told me the name in Port Charlotte and told me he needed a ride back.

Q Was that the only telephone call you received that day from Mike Fink?

A That is the only one I recall. He may have called earlier and talked to somebody else.

Q Who else was there?

A My wife was there -- somebody else was there but I cannot remember who it was.

Q Did your wife tell you you had received a call from Mike Fink?

A If she did, I don't remember.

Q She came to pick you up at the airport, did she not?

A That's right.

Q And you told her where you had been?

A Yes.

Q After you told her you had been there she didn't say anything about Mike Fink calling?

A I don't recall.

Q Okay. Did there come a time when you drove down to Lehigh Acres or to the Fort Myers area --

A Do you mean Port Charlotte?

Q Was it Port Charlotte?

A I believe that is where it was.

Q Where were they located in Port Charlotte?

A A motel down there.

Q Was it the Ramada Inn?

A I wouldn't say for sure, but I believe that is it.

Q And you saw the receipt from the Ramada Inn, did you not?

A Yes.

Q You recall Government's Exhibit Number 3, do you not, reflecting several telephone calls -- two telephone calls

made to your number --

MR. LEVINE: I object to this line of inquiry. It is not a proper line of inquiry of this witness, Your Honor.

THE COURT: Sustained.

BY MR. LaSPADA:

Q And what happened after you arrived at Port Charlotte?

A Mike and Randy told me what happened.

Q Well, you had known before that, had you not?

A When Steve called and said he was in jail.

Q Did you go into their room at that time?

A Mike and Randy's?

Q Yes.

A I believe so, yes.

Q What happened after you arrived in their room?

A We talked for a little while and I believe Randy called up Phil Davis -- just started to make the call. I think Mike and I ran out and got a couple of Coca Colas. He was through with the phone call by the time we got back.

Q Randy called Phil Davis and you and Mike went out to get a couple of Cokes?

A I believe so. We left the room for something and I believe that is what it was.

Q You weren't upset at that time, were you?

A I was terribly upset -- never been so nervous in all my

life.

Q Why did Mr. Kilgore call Mr. Davis?

A You will have to ask Mr. Kilgore that.

Q He didn't tell you why he was calling Mr. Davis?

A No.

Q Did he tell you what happened after he called Mr. Davis?

A No.

Q But you went out and got a couple of Cokes while he was making his call, is that correct?

A I believe -- I remember leaving the room, and I believe that is what we did.

Q Directing your attention to the year 1972, prior to November 26, 1972, did you at any time ever allow Mr. Alvarez to put title of a Porsche automobile in your name?

A Did I allow him to?

Q Yes.

A No.

Q You did not?

A No.

Q Was the title to the Porsche automobile owned by Mr. Alvarez ever put in your name?

A Yes.

Q Why did that happen.

A Mr. Alvarez told me he was looking for a 911-E Porsche, which is pretty rare and hard to find. We checked locally

and were unable to find one. I told him a friend of mine worked at a Porsche dealership and I would call him and he might be able to locate one. I called him up and told him that a friend of mine was looking for a 911-E and could he possibly locate one for me. He placed some calls and got back with me in about an hour or so and said he located one in Atlanta, Georgia and described it to me, and gave me somebody's name up there to call if interested.

I called Pedro and described the car to him and asked if he wanted it and he said yes, to go get it. I called Mr. Shimo back and told him I would pick it up. I never told Mr. Shimo my friend's name -- I just told him it was for a friend. He relayed my name up to Atlanta and my wife and I flew up on the plane. We were picked up at the airport, taken back to the Porsche dealership and the place was closed except for the one guy keeping it open just for us.. We test drove the car, came back and got all the papers out -- it was in my name and I said, "This is for somebody else." He said the easiest thing to do rather than do the peper work over again is that when the title came from Georgia to Florida, to have it titled in Florida and to go ahead and title it in Mr. Alvarez' name at that time. So we bought the car, got the sales receipt and headed back to Tampa and drove the car back.

Q Now, when you first made contact with this individual from Georgia, did you advise Mr. Alvarez of that fact that there was a car there available?

A Yes, I did.

Q Did you give Mr. Alvarez the number of the individual so he could call to make arrangements to have the car picked up?

A He told me to pick it up.

Q Every time Mr. Alvarez told you to do something, did you do it?

A Not everytime, no. He asked if I would go pick it up and he would pay my way and my wife's way to Atlanta for the weekend, so I picked the car up for him.

Q Did you pay for it in cash?

A Yes.

Q How much did you pay for it?

A I believe around thirteen thousand dollars.

Q Where did you get the money?

A From Pedro.

Q Did this occur prior or subsequent or to the time that you first became aware that Mr. Alvarez was a narcotics trafficker in the Tampa area?

A I don't recall exactly when it was.

Q Did it occur prior to the trip to Knoxville and the concert?

A I don't recall.

Q Did it occur prior to November 26, 1972 smuggling?

A Yes, it did. It was around September sometime -- the only thing that sticks out in my mind, the fact that the car was wrecked before we even got title on the car -- it was wrecked Labor Day weekend, so sometime before then the car was purchased.

Q What papers did you bring back with that car concerning the ownership?

A I believe the sales receipt.

Q What else?

A That is all I can think of.

Q Did they give you a temporary title?

A Temporary title?

Q Yes.

A I don't believe so.

Q Temporary tag?

A The only tag on it was up there in Georgia -- the dealership, like they have the name -- I don't remember the dealership so and so Porsche, and that was the tag up there.

Q After you arrived in Tampa, did you go to the automobile department of vehicles and register the car?

A I believe we got a Florida tag for it -- I don't know if I did that or if Pedro did it. I can't remember. The first thing I did when I got back to Florida was insure

the car.

Q You insured the car?

A Yes, I did. It was going to be about a week before Pedro was going to be able to take possession of the car. I believe he was out of town or something. He left town and told me that I could keep the car until he got back and to get some insurance on it.

Q Whose name did you put the insurance in?

A I believe it was both -- I told the insurance man who it belonged to and that the title was being switched over. He said it would have to be in my name as long as the title was in my name, and when the title was switched, it would be in Pedro's name.

Q Did you ever tell Mr. Kilgore you allowed Mr. Alvarez to put the title of this car in your name because he didn't want the people in the United States Treasury Department -- the IRS to know that he had that much money to pay for a car of that sort?

A I never told Kilgore anything of the sort.

Q Did you ever tell anyone that you allowed Mr. Alvarez to put title of that car in your name so that no one including the Internal Revenue Service would know Mr. Alvarez had that much money?

A I never told anybody that. The only thing I did mention -- I remember mentioning to Randy, I think Steve was present

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appendices to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been furnished, by mail, to the United States Attorney's Office for the Middle District of Florida, Post Office Box 2841, Tampa, Florida 33601; Wade McCree, Jr., Solicitor General of the United States of America, Department of Justice, Washington, D. C.; and to Edward W. Wadsworth, Clerk of the United States Court of Appeals for the Fifth Circuit, 600 Camp Street, New Orleans, Louisiana 70130, this _____ day of February, 1979.

_____
ATTORNEY

Supreme Court, U. S.
FILED
APR 6 1979
MICHAEL RODAK, JR., CLERK

No. 78-1245

In the Supreme Court of the United States

OCTOBER TERM, 1978

JOHN A. GEDERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. B-1 to B-3) is reported at 585 F. 2d 1303. The panel opinion (Pet. App. A-1 to A-9) is reported at 566 F. 2d 1227.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 1978. A petition for rehearing was denied on January 10, 1979. The petition for a writ of certiorari was filed on February 9, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether post-arrest statements made by petitioner to an Assistant United States Attorney at a conference initiated by petitioner were inadmissible under Fed. R.

Crim. P. 11(e)(6), which bars the introduction of statements made in the course of plea negotiations.

2. Whether petitioner's statements were inadmissible on rebuttal because the Assistant United States Attorney had told petitioner that this case would not be discussed at the conference.

RULE INVOLVED

Rule 11(e)(6), Fed. R. Crim. P., provides:

> Except as otherwise provided in this paragraph, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

STATEMENT

On retrial[1] before a jury in the United States District Court for the Middle District of Florida, petitioner was convicted of conspiracy to import marihuana, importation of marihuana, and possession of 977 pounds of marihuana with intent to distribute it, in violation of 21 U.S.C. 952(a) and 841(a)(1). He was sentenced to concurrent terms of imprisonment for three years and a three-year special parole term. A divided panel of the court of appeals reversed petitioner's conviction. 566 F. 2d 1227 (Pet. App.). Thereafter, the Fifth Circuit reheard the case en banc and affirmed the conviction. 585 F. 2d 1303 (Pet. App. B-1 to B-3).

1. The evidence at trial showed that in September 1972 petitioner was a partner with one Pedro Alvarez in a stereo sales and installation business in Tampa, Florida (Tr. 61-62). At that time petitioner became acquainted with William Randy Kilgore, who had been employed in Alvarez's marihuana importation operation (Tr. 63-65). Petitioner and Kilgore subsequently agreed to engage in a marihuana importation venture without Alvarez. During the ensuing few weeks several others were recruited for the undertaking, numerous planning meetings were conducted, and petitioner traveled to Colombia, where he negotiated with Alvarez's own source.

Among the recruits to the venture was David Butler, a government informant who was assigned by the conspirators to pilot the airplane that would be used for the round trip journey to Colombia to pick up the marihuana. Butler participated in the planning meetings with the conspirators during October and November of 1972 and selected an area known as Lehigh Acres as the return landing site. On one occasion petitioner and two others drove to Lehigh Acres to inspect the location (Tr. 330-332).

On the morning of November 26, 1972, Butler flew his plane to Colombia, carrying petitioner and another co-conspirator as passengers. They obtained a load of marihuana and returned to Lehigh Acres that same evening. Customs officials, who had been maintaining surveillance of Lehigh Acres, arrested some of the

[1] Petitioner was originally convicted in 1973, and the court of appeals affirmed *sub nom. United States* v. *Fink*, 502 F. 2d 1 (5th Cir. 1974). This Court reversed, holding that it was error for the district court to deny counsel access to petitioner during an overnight recess that had interrupted petitioner's direct testimony. *Geders* v. *United States*, 425 U.S. 80 (1976).

conspirators there after the delivery of the marihuana had been completed. By the next day all the conspirators, including petitioner, were in custody (Pet. App. A-3).

2. Petitioner's defense at trial was entrapment. He admitted traveling with various alleged co-conspirators to places in Florida where planning meetings took place. He claimed, however, that his sole purpose in traveling to these places was pleasure; he denied that he had participated actively in the meetings (Tr. 651-654, 655, 669-670). Petitioner claimed that he agreed to join the conspiracy only after continuous urging by Butler (Tr. 673-675).

3. In advancing his defense of entrapment, petitioner testified that he had never sold illegal drugs or used drugs other than marihuana, and that he had used marihuana only infrequently (Tr. 698-702). On cross-examination, petitioner was asked about a Porsche automobile titled to him but used by Pedro Alvarez. He gave an explanation in which he denied telling anyone that the purpose of this arrangement was to conceal Alvarez's affluence from the Internal Revenue Service (Tr. 929-930). In addition, he was asked about being a courier of money to New York for Alvarez's drug operation. He admitted that he had done so, but he insisted that that incident had occurred in December 1972, a month after the offense with which he was charged (Tr. 930-931). Later in the trial, three government rebuttal witnesses—two co-conspirators and a former Assistant United States Attorney—all testified that petitioner had told them that the purpose of titling the Porsche in his name was to conceal its true ownership from the Internal Revenue Service (Tr. 977-978, 1030-1031, 1041). Furthermore, each of these rebuttal witnesses stated to the jury that petitioner had admitted transporting small bills to New York City for Alvarez, converting them into large bills, and giving the large bills to Alvarez upon returning to Tampa. They said he had further stated that that incident occurred prior to the events for which he

was on trial (Tr. 978-979, 1031-1032, 1042). The court instructed the jury that it could consider the testimony concerning the Porsche only as it bore on petitioner's credibility (Tr. 979-980) and that it could consider the testimony concerning the New York City trips only as it bore on his predisposition (Tr. 1245).[2]

4. The circumstances under which the Assistant United States Attorney obtained the statements from petitioner that were introduced on rebuttal may be summarized as follows. Prior to trial, but several months after his arrest, petitioner telephoned customs agent Lowell Miller and said that he wanted to reveal some information about Alvarez. Petitioner then went to Miller's office, where they chatted for a brief period, following which they went to the office of Assistant United States Attorney Oscar Blasingame (Tr. 760-761, 769).

At the outset of the meeting Blasingame administered a full *Miranda* warning to petitioner and set forth as ground rules that the purpose of the meeting was to discuss Alvarez; that petitioner understood that he had come voluntarily; and that the pending case against petitioner would not be discussed (Tr. 739, 746-747).[3] Blasingame asked whether petitioner wanted his attorney or another lawyer present, and petitioner replied that he did not (Tr. 739-740). In fact, petitioner insisted that his

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[2]Specifically, the court instructed the jury that this evidence was admissible on the issue of predisposition only if the jury determined that the travel to New York had occurred before the date of the offense in question. The jury was told that if it determined otherwise, it should disregard the evidence (Tr. 1254).

[3]At the time of this conference Blasingame knew that petitioner's pending trial did not involve Alvarez; thus, he felt that a discussion regarding Alvarez would not reveal anything relevant to petitioner's case. When asked by the court whether he planned to use the information obtained from this conference against petitioner "in this case," Blasingame replied, "No, Your Honor, we had no idea that we would get into this Pedro Alvarez business in the trial" (Tr. 743).

own attorney not be told about the meeting because the attorney had previously represented Alvarez (Tr. 739-740, 759-760). Petitioner and Blasingame then proceeded to discuss Alvarez; in the course of the discussion, petitioner made the statements that Blasingame related as a rebuttal witness at trial, including the statement that he had permitted Alvarez to register his Porsche in petitioner's name although it had been purchased by Alvarez, and the statement that he had traveled to New York City on Alvarez's behalf to exchange small bills for large ones (Tr. 1038-1042).

ARGUMENT

Petitioner argues that the trial judge erred in permitting Assistant United States Attorney Blasingame to reveal information obtained in the course of the post-arrest interview. In petitioner's view the statements made to Blasingame were a part of plea bargaining discussions (Pet. 13-15, 18-25) and as such were inadmissible under Rule 11(e)(6), Fed. R. Crim. P. Moreover, petitioner claims (Pet. 15-18) that, irrespective of the reach of Rule 11(e)(6), his statements to Blasingame should not have been admitted—even in rebuttal—because Blasingame had, in effect, promised not to use statements made by petitioner at the conference against him at trial. Neither of these claims warrants review by this Court.

1. Although petitioner now characterizes his interview with Blasingame as a plea bargaining session, petitioner testified otherwise at trial, where he stated, outside the presence of the jury, that he never intended to plead guilty (Tr. 727-728):

THE COURT:	Were you going to plead guilty?
THE WITNESS:	Pardon?
THE COURT:	Were you going to plead guilty then?

THE WITNESS:	He mentioned something about pleading and I said I didn't want to because I felt I was innocent of the charges in my case. I would work out and cooperate, but not by pleading guilty.
THE COURT:	You were going to trial?
THE WITNESS:	Right.
THE COURT:	You were going to go to trial, but he was going to get the Judge to let you off?
THE WITNESS:	He was going to talk to the Judge about it.
THE COURT:	About what?
THE WITNESS:	About dropping the charges. I told him that I wouldn't plead guilty, that they would have to drop the charges altogether, and he said he would have to talk to the Judge, and that he couldn't promise me that himself.

By contrast, Blasingame described his conference with petitioner as merely "a preliminary meeting to find out what sort of things he could offer and what sort of investigation would go from there" (Tr. 740). Blasingame denied that any promises were made to petitioner. Asked if there was any discussion regarding the dropping of charges, Blasingame replied, "Not to my recollection" (Tr. 742).

With the situation in that posture, the en banc court correctly concluded that petitioner's statements to Blasingame could not fairly be described as "statement[s] made in connection with, and relevant to," a plea of guilty or an offer to plead guilty. Rule 11(e)(6), which prohibits

the use of such plea-related statements, was intended to encompass only those statements made in connection with fairly formal plea bargaining. 2 *Weinstein's Evidence* para. 410[07], at 410-40 to 410-41 (1977). See also *United States* v. *Stirling*, 571 F. 2d 708, 730-732 (2d Cir.), cert. denied, Nos. 77-1612 and 77-1761 (Oct. 2, 1978).[4] Otherwise, almost any instance of post-arrest voluntary self-incrimination would be subject to a claim of use immunity under Rule 11(e)(6).

An arrestee who cooperates with law enforcement officials obviously hopes to help his own cause, regardless of whether promises of leniency have been tendered in exchange for his cooperation. Yet if any statement made by a cooperating arrestee is deemed to constitute an effort to engage in plea bargaining, then Rule 11(e)(6) will be given a scope far beyond the salutary purpose it was intended to serve: to encourage free and frank plea discussions. Instead, the purpose of Rule 11(e)(6) is best served if the defendant is required in some fashion to manifest his intention to engage in plea negotiations before he makes voluntary admissions. *United States* v. *Levy*, 578 F. 2d 896, 901 (2d Cir. 1978). As the record

[4]The Advisory Committee on the Criminal Rules has proposed an amendment to Fed. R. Crim. P. 11(e)(6) to make it clear that the Rule does not apply to voluntary admissions to law enforcement officers made in the hope of obtaining leniency. See Committee on Rules of Practice and Procedure, *Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure* 22-24 (1978). That amendment was proposed in light of the Fifth Circuit's previous decision in *United States* v. *Herman*, 544 F. 2d 791 (5th Cir. 1977), where the court gave a very broad construction to Rule 11(e)(6). In the instant case and in the companion case of *United States* v. *Robertson*, 582 F. 2d 1356 (5th Cir. 1978), the court limited the reach of *Herman* in a manner consistent with the language and purpose of Rule 11(e)(6) and the proposed amendment to that rule.

shows, that was not the situation when petitioner conferred with Blasingame. See *United States* v. *Arroyo-Angulo*, 580 F. 2d 1137, 1147-1149 (2d Cir.), cert. denied, No. 78-5172 (Oct. 16, 1978).[5]

To the extent that petitioner contends that he was, in fact, engaged in plea bargaining, his contention constitutes only a disagreement over a factual issue resolved against him by the district court and the en banc court of appeals. This case is therefore not at all comparable to *United States* v. *Smith*, 525 F. 2d 1017 (10th Cir. 1975), on which petitioner relies, for in that case the court of appeals noted that there was no question but that the conversation at issue "was in the nature of plea bargaining" (*id.* at 1019 n.1).

2. Petitioner also contends that Blasingame made an unqualified promise that petitioner's statements would not be used against him at trial. Yet, as the en banc court observed, there is a substantial and unresolved factual question as to what Blasingame promised petitioner with respect to the discussions in the conference. Blasingame testified that he told petitioner they would not discuss this case. The district court credited that testimony, but added that "it was impliedly agreed that the statements made by him, disclosure of the information he gave would not be used in this case" (Tr. 778). The en banc court characterized the agreement as either "a promise

[5]Privileges such as the attorney-client privilege or the plea bargaining privilege found in Rule 11(e)(6) serve their purposes only to the extent that the individual is aware of and relies on the privilege in making a particular disclosure. If the individual speaks without intending to rely on the privilege, the exclusion of the evidence imposes costs without promoting any countervailing benefits in the way of encouraging disclosures that would not be made in the absence of the privilege. For that reason, the privilege of Rule 11(e)(6) should be limited to fairly formal plea bargaining, where it may be anticipated that the defendant will make full disclosure in reliance upon the shelter of the privilege.

that nothing said would be used against him" or "a commitment that his pending case would not be discussed" (Pet. App. B-2).

Even if petitioner's version of the facts is accepted, any "agreement" not to use petitioner's statements against him at trial should not be expansively construed to mean that petitioner would be free to present inconsistent testimony at trial without being subject to contradiction based on his pretrial statements. And even if the agreement is given that broad construction, it should not be enforced in a manner that would deny the jury the opportunity to consider the impeachment value of prior statements by petitioner that were squarely contrary to his testimony at trial. Compare *Oregon* v. *Hass*, 420 U.S. 714 (1975); *Harris* v. *New York*, 401 U.S. 222 (1971); *Walder* v. *United States*, 347 U.S. 62 (1954).[6]

In sum, petitioner's claims turn in large measure on the unusual facts presented here. And even if those facts were resolved in petitioner's favor, his claims, examined in context, presents no substantial question of law calling for review by this Court.

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[6]In any event, Blasingame's rebuttal testimony about petitioner's dealings with Alvarez was cumulative to rebuttal testimony presented by two co-conspirators (Tr. 977-979, 1030-1032). In addition, there was at trial other testimony, directed at petitioner's predisposition or challenging his credibility, that was unaffected by the statements in question, such as evidence that petitioner had sold and used drugs (Tr. 974-975, 1030). In light of these considerations, the error, if any, in the admission of Blasingame's testimony was harmless. See *United States* v. *Levy*, *supra*, 578 F. 2d at 902.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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